FOR ARGUMENT

Nos. 77-983, 78-119 and 78-139

Supreme Court, U. S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*, *Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

REPLY BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, *Et Al.*

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz
Wells & Fryer
3300 Seattle-First National
Bank Building
Seattle, Washington 98154

Attorneys for Puget Sound Gillnetters Association, et al.

JOSEPH T. MIJICH
JOHN P. WORLD
3920 Bank of California
Center
Seattle, Washington 98164

Attorneys for Purse Seine Vessel Owners Association, et al.

Of Counsel:

PHILIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION AND SUMMARY	2
ARGUMENT	9
I. THE 50-50 ALLOCATION ORDERED BY THE COURTS BELOW CANNOT STAND	9
A. The Stevens Treaties Accord Individuals Equal Rights To Compete For Fish	10
1. The Historical Record In This Case Confirms That The Treaty Parties Intended No Preference For Indian Fishing	11
a. The Indians' Claims Are Inconsistent With The Historical Record On Which The District Court's Findings Are Based	12
b. The Indians' Claims Are Inconsistent With The District Court's Findings Of Fact	15
2. Far From Supporting Preferential Fishing Rights For Anyone, This Court's Precedents Direct That Discrimination Against Individuals Cannot Be Countenanced Under The Stevens Treaties	.....
3. The Apportionment Improperly Grants Preferential Rights To Indians Without Regard To Any Discrimination Against Them	25
B. If An Allocation Were Permissible, It Could Not Be Based On A 50-50 Split	30
1. A 50-50 Split Is Inconsistent With The Creation Under The Treaties Of Individual Rights Of Equal Dignity, With Common Sense, And With The Understanding Of The Treaty Parties	31

Page

2. The Treaties Cannot Be Interpreted By Analogy To Agreements Between Two Foreign Governments 33

3. Nineteenth Century International Fishing Treaties Were Not Implemented By A 50-50 Allocation 36

4. One-Sided Emphasis On The Indians' Alleged Needs Does Not Justify The 50-50 Apportionment 41

C. Modern Conditions Do Not Permit The Judiciary To Create A Preference For Indian Fishing 43

II. THIS COURT SHOULD NOT BE DIVERTED FROM SETTLING THE INTERPRETATION OF THE TREATIES 47

A. The Original Decision Of The District Court In This Case Cannot Be Accorded *Res Judicata* Effect 48

1. The District Court's Decision Was Non-Final And, Therefore, Not Entitled To *Res Judicata* Effect 49

2. The Parties To The Original District Court Decision Were Not The Same As The Parties In The Later Proceedings, And There Was No "Privity" 54

3. This Court's Prior Denial Of Certiorari Did Not Render The District Court's 1974 Decision *Res Judicata* 58

B. The State Supreme Court Properly Reached The Merits Of Petitioners' Claims And Its Decision Is Properly Before This Court For Review 59

Page

1. The State Cases Present Justiciable Controversies 60

2. The Absence Of The United States And The Indians From The State Cases Did Not Bar The State Courts From Adjudicating The Commercial Fishermen's Claims 65

C. The State Courts Were Not Obligated To Defer To The Lower Federal Courts As A Matter Of Comity Or Under The Supremacy Clause 67

1. No Principle Of Comity Applied 68

2. The State Court Judgments Are Not "Void Under The Supremacy Clause" 71

D. The Holding Of The State Supreme Court As To The Power Of State Officials Must Be Accepted By This Court 72

1. The Holding Is A Matter Of State Law 72

2. A Federal District Court May Not Mandate That State Officials Act Affirmatively In Excess Of Their Authority Under State Law 74

III. THE DISTRICT COURT'S INJUNCTIONS AGAINST THE NON-TREATY FISHERMEN WERE ISSUED WITHOUT PERSONAL JURISDICTION 77

1. The Orders Against Petitioners Were Not Merely Ancillary To The Original Decree 77

2. The Non-Treaty Fishermen Were Not Vicarious Parties To The Original Federal Proceedings And Suffered Actual Prejudice From The Denial Of A Hearing 79

CONCLUSION 86

TABLE OF AUTHORITIES

CASES:	Page
Acha v. *Beame*, 570 F.2d 57 (2d Cir. 1978)	50,52
Aetna Casualty & Surety Co. v. *Giesow*, 412 F.2d 468 (2d Cir. 1969)	52
Alemite Manufacturing Corp. v. *Staff*, 42 F.2d 832 (2d Cir. 1930)	85
Alley v. *Dodge Hotel*, 551 F.2d 442 (D.C. Cir.), *cert. denied*, 431 U.S. 958 (1977)	50
Allis-Chalmers Corp. v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975)	51
Antoine v. *Washington*, 420 U.S. 194 (1975)	22
Arizona v. *California*, 373 U.S. 546 (1963)	42
Associated General Contractors of America, Inc., v. *Laborers' International Union*, 476 F.2d 1388 (Temp. Emer. Ct. App. 1973)	65
Bache & Co., Inc. v. *Taylor*, 458 F.2d 395 (5th Cir. 1972)	51
Bell v. *School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963)	76
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	54
Boles v. *Greeneville Housing Authority*, 468 F.2d 476 (6th Cir. 1972)	71
Bradley v. *School Board*, 51 F.R.D. 139 (E.D. Va. 1970)	76
Bullock v. *United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959)	77
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	69
Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968)	76
Catlin v. *United States*, 324 U.S. 229 (1945)	52

	Page
Charles Dowd Box Co., Inc., v. *Courtney*, 368 U.S. 502 (1962)	68
Chase National Bank v. *Norwalk*, 291 U.S. 431 (1934)	
Cheng Fan Kwok v. *Immigration and Naturalization* ..	54,85
Service, 392 U.S. 206 (1968)	62
City of Louisa v. *Levi*, 140 F.2d 512 (6th Cir. 1944)	52
City of Parma v. *Levi*, 536 F.2d 133 (6th Cir. 1976)	50
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	56,80
Claflin v. *Houseman*, 93 U.S. 130 (1876)	68
Commissioner v. *Sunnen*, 333 U.S. 591 (1948)	54
Consumers Union of the United States v. *Consumer Product Safety Commission*, 400 F. Supp. 848 (D.D.C. 1975), *rev'd*, 561 F.2d 349 (D.C. Cir. 1977), *vacated and remanded for further consideration*, 434 U.S. 1030 (1978), *on remand*, Slip Op., No. 75-2059 (D.C. Cir. Dec. 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. Feb. 12, 1979)	56,57,58 62,63,68, 69,71
DeFunis v. *Odegaard*, 84 Wash. 2d 617, 529 P.2d 438, *on remand from* 416 U.S. 312 (1974)	61
Department of Game of the State of Washington v. *Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*)	6,22,23 27,31,44, 76
Diffenderfer v. *Central Baptist Church*, 404 U.S. 412 (1972)	76
Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. *Missouri*, 374 U.S. 74 (1963)	76
Doctor v. *Seaboard Coast Line Railroad*, 540 F.2d 699 (4th Cir. 1976)	51

	Page
Dolman v. *United States*, No. A-534 (78-987) (U.S. Dec. 21, 1978) (Mr. Justice Rehnquist, in chambers)	77
Douglas v. *Sea Coast Products*, 431 U.S. 265 (1977)	84
Erie Railroad v. *Tompkins*, 304 U.S. 641 (1938)	68
George v. *Victor Talking Machines Co.*, 293 U.S. 377 (1934)	52
Granville-Smith v. *Granville-Smith*, 349 U.S. 1 (1955)	62
Green v. *County School Board of New Kent County*, 391 U.S. 430 (1968)	72
Griffin v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964)	72,75
Gumer v. *Shearson, Hammill & Co., Inc.*, 516 F.2d 283 (2d Cir. 1974)	51
Hall v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962)	75
Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916)	59
Hanover Shoe v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	59
Hansberry v. *Lee*, 311 U.S. 32 (1940)	54,56
Hanson v. *Denckla*, 357 U.S. 235 (1958)	67
Holton v. *Crozer-Chester Medical Center*, 560 F.2d 575 (3d Cir. 1977)	50
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)	59
Indianapolis v. *Chase National Bank*, 314 U.S. 63 (1941)	59
In re Curtis Petition, 240 F. Supp. 475 (E.D. Mo. 1965), *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 368 U.S. 914 (1967)	75,77
James v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959)	75

	Page
John Simmons Co. v. *Grier Brothers Co.*, 258 U.S. 82 (1922)	2,52
Kasper v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957)	77
Kentucky v. *Indiana*, 281 U.S. 163 (1930)	62,63
Kerotest Manufacturing Co. v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952)	70
Liberty Mutual Insurance Co. v. *Pennsylvania Railroad*, 322 F.2d 963 (7th Cir. 1963)	52
Liberty Mutual Insurance Co. v. *Wetzel*, 424 U.S. 737 (1976)	52
Lord v. *Veazie*, 49 U.S. (8 How.) 251 (1850)	61
Maness v. *Meyers*, 419 U.S. 449 (1975)	77
Maggio v. *Zeitz*, 333 U.S. 56 (1948)	59
Mallow v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827)	59,70
Marconi Wireless Telegraph Co. v. *United States*, 320 U.S. 1 (1943)	52
Mercer v. *Theriot*, 377 U.S. 152 (1964)	59
Minerich v. *United States*, 29 F.2d 565 (6th Cir.), *cert. denied*, 279 U.S. 843 (1929)	77
Minnesota v. *United States*, 305 U.S. 382 (1939)	66
Missouri v. *Holland*, 252 U.S. 416 (1920)	84
Missouri v. *Illinois*, 180 U.S. 208 (1901)	80
Moore v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 47 (1971)	64
National Labor Relations Board v. *Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942)	
Nebraska v. *Wyoming*, 295 U.S. 40 (1935)	55,80
New Jersey v. *New York*, 345 U.S. 369 (1953) (per curiam)	55,80
New York v. *Nuclear Regulatory Commission*, 550 F.2d 745 (2d Cir. 1977)	50

	Page
North Carolina State Board of Education v. *Swann*, 402 U.S. 43 (1971)	72
Nozewski Polish Style Meat Products v. *Meskill*, 376 F. Supp. 610 (D. Conn. 1974)	61
Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 (1945)	43
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	12,35,44
Oliver v. *Monsanto Co.*, 56 F.R.D. 370 (S.D. Tex. 1972), *aff'd per curiam sub nom. Oliver* v. *Home Indemnity Co.*, 487 F.2d 514 (5th Cir. 1973)	51
Panichella v. *Pennsylvania Railroad*, 252 F.2d 452 (3d Cir. 1958)	51
Parklane Hosiery Co., Inc. v. *Shore*, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979) (No. 77-1305)	54
Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923)	80
Piper v. *Chris Craft Industries, Inc.*, 430 U.S. 1 (1977)	59
Provident Tradesman Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968)	57,66,70
Puget Sound Gillnetters Association v. *Moos*, 88 Wash. 2d 677, 565 P.2d 1151 (1977), *cert. granted*, 47 U.S.L.W. 3265 (U.S. Oct. 16, 1978) (No. 77-983)	65,72,80
Purse Seine Vessel Owners Association, et al. v. *U.S. Department of State*, U.S. Dist. Ct., W.D. Wash., Cause No. C77-471	29
Puyallup Tribe v. *Department of Game of the State of Washington*, 391 U.S. 392 (1968) (*Puyallup I*)	6,21,22
Puyallup Tribe, Inc. v. *Department of Game of the State of Washington*, 433 U.S. 165 (1977) (*Puyallup III*)	6,8,23, 24,34,36
Railroad Commission of Texas v. *Pullman Co.* 312 U.S. 496 (1941)	68,69

	Page
Regal Knitwear Co. v. *NLRB*, 324 U.S. 9 (1945)	85
Republic of China v. *American Express Co., Inc.*, 190 F.2d 334 (2d Cir. 1951)	50,51
Russel v. *United States*, 86 F.2d 389 (8th Cir. 1936)	77
Schwartz v. *Campagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968)	51
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	83,84
Sharon v. *Tucker*, 144 U.S. 533 (1892)	62
Shields v. *Barrow*, 58 U.S. (17 How.) 130 (1854)	67
South Spring Hill Gold Mining Co. v. *Medean Gold Mining Co.*, 145 U.S. 300 (1892)	61
State of Washington v. *Confederated Bands and Tribes of the Yakima Nation*, 47 U.S.L.W. 4111 (U.S. Jan. 16, 1979) (No. 77-388)	44
Stevens v. *Security Pacific National Bank*, 538 F.2d 1387 (9th Cir. 1976)	50
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940)	59
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)	79
Swift & Co. v. *United States*, 276 U.S. 311 (1928)	62
Testa v. *Katt*, 330 U.S. 386 (1947)	72
Thaxton v. *Vaughn*, 321 F.2d 474 (4th Cir. 1963)	76
Tileston v. *Ullmann*, 318 U.S. 44 (1943)	60
Toomer v. *Witsell*, 334 U.S. 385 (1948)	84
Tulee v. *Washington*, 315 U.S. 681 (1942)	7,8,21, 24
United States v. *Dean Rubber Manufacturing Co.*, 71 F. Supp. 96 (W.D. Mo. 1946)	83
United States v. *Hall*, 472 F.2d 261 (5th Cir. 1972)	77
United States v. *Johnson*, 319 U.S. 302 (1943)	61
United States v. *North Carolina*, 425 F. Supp. 789 (E.D.N.C. 1977)	51

	Page
United States v. *Ryan*, 402 U.S. 530 (1971)	77
United States v. *United Mine Workers*, 330 U.S. 258 (1947)	77
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940)	66
United States v. *Washington*, 573 F.2d 1118 (9th Cir.), *cert. granted*, 47 U.S.L.W. 3265 (U.S. Oct. 16, 1978) (Nos. 78-119 & 78-139)	2,81
United States v. *Washington*, 520 F.2d 676 (9th Cir. 1975), *aff'g* 384 F. Supp. 312 (W.D. Wash. 1974), *cert. denied*, 423 U.S. 1086 (1976)	10,18,53 81,84
United States v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)	4,5,9,10, 12,13,16, 17,18,19, 32,34,43, 46,50,52, 53
United States v. *Wheeler*, 46 U.S.L.W. 4243 (U.S. March 22, 1978) (No. 76-1629)	35
United States v. *Winans*, 198 U.S. 371 (1905)	5,6,7,8, 11,19,20, 21,24,36, 44
Virgin Islands v. *2.6912 Acres of Land*, 396 F.2d 3 (3rd Cir. 1968)	50
Walker v. *City of Birmingham*, 388 U.S. 307 (1967)	77
Washington State Commercial Passenger Fishing Vessel Association v. *Tollefson*, 87 Wash. 2d 417, 553 P.2d 113, *on rehearing*, 89 Wash. 2d 276, 571 P.2d 1373 (1977), *cert. granted*, 47 U.S.L.W. 3265 (U.S. Oct. 16, 1978), (No. 77-983)	65,72

	Page
Winters v. *United States*, 207 U.S. 564 (1908)	42
Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	67
Wright v. *County School Board*, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd on other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972)	76
Wyoming v. *Colorado*, 286 U.S. 494 (1932)	80
CONSTITUTION AND STATUTES:	
United States Constitution:	
Article III	60,61,64
Supremacy Clause	67,68,71
Fourteenth Amendment	10
United States Statutes:	
Fisheries Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*	27
Citizenship Act of 1924, 8 U.S.C. § 1401(a)(2) (1966 amendment)	46
28 U.S.C. § 1292(a)(1)	50
Judiciary Act of 1875, § 1, 18 Stat. 470	69
Appropriation Act of March 3, 1853, 10 Stat. 226,238	12
Act of March 2, 1853, 10 Stat. 172	12
Washington Statutes:	
Wash. Rev. Code	
§75.12.010	73
§75.28.450	28
RULES:	
United States Supreme Court Rules,	
Rule 19	59
Rule 34	2

	Page
Federal Rules of Civil Procedure,	
Rule 19	48,57,58, 66,70
Rule 20	48,57,58 70
Rule 23	48,57,70
Rule 54(b)	2,49,50, 51,52
Rule 65(d)	77,84,85
Washington Rules of Civil Procedure, Rule 24	66
REGULATIONS:	
1977 BIA Regulations, 42 Fed. Reg. 31450	27
1978 BIA Regulations, 43 Fed. Reg. 27187	27
1977 IPSFC Regulations, 42 Fed. Reg. 30841	27
1978 IPSFC Regulations, 43 Fed. Reg. 26737	27
TREATIES:	
Treaty of October 20, 1818, 8 Stat. 248	5,9,37
Treaty of June 5, 1854, 10 Stat. 1089	37
Treaty of Medicine Creek, 10 Stat. 1132 (1854)	passim
Treaty of Point Elliott, 12 Stat. 927 (1855)	passim
Treaty of Point No Point, 12 Stat. 933 (1855)	17,passim
Treaty with the Makahs, 12 Stat. 939 (1855)	passim
Treaty with the Yakimas, 12 Stat. 951 (1855)	20,32 passim
Treaty of Olympia, 12 Stat. 971 (1855)	passim
Treaty of May 8, 1871, 17 Stat. 863	37,38
CONGRESSIONAL MATERIALS:	
S. Doc. No. 870, 61st Cong., 2d Sess. (1910)	38,39,40, 41
H. Ex. Doc. No. 84, 46th Cong., 2d Sess. (1881)	39

	Page
SECONDARY AUTHORITIES:	
Frankfurter, *Note On Advisory Opinions,* 37 Harv. L. Rev. 1002 (1924)	61
Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630 (1978)	57
J. Adams, *The Fisheries and The Mississippi* (1822)	38
P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System* (Foundation 2d ed. 1973)	68,69
R. Marasco & E. Anderson, *Washington Salmon Fisheries: An Economic Profile* (Washington Department of Fisheries, October 1977), *cited in* U.S. Department of Commerce, NOAA, National Marine Fisheries Service, *Fisheries Statistics of the United States.*	30
J. Moore, *Moore's Federal Practice* (Mathew Bender 2d ed. 1974)	50,61
Restatement (Second), Judgments (Tent. Draft No. 1, 1973)	
R. Thompson, *Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission* (National Marine Fisheries Service, November 1978).	28,29
U.S. National Marine Fisheries Service, *Preliminary Summary of the 1977 Sockeye and Pink Salmon Commercial Fisheries in U.S. Convention Waters* (1977)	29
C. Wright, *Law of Federal Courts* (West 3d ed. 1976)	62,77
C. Wright & A. Miller, *Federal Practice and Procedure* (West 1972)	50,51, 62,66,83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

No. 78-119

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*, *Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

REPLY BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, ET AL.

INTRODUCTION AND SUMMARY

1. The briefs of the government and the Indian tribes attempt to erect a series of procedural obstacles to reaching the merits of the controversy before the Court. At least for the government, which acquiesced in certiorari precisely to have these issues laid to rest, this is an astounding change of position. In any event, the objections to plenary review are without substance, and only reflect on respondents' part the same lack of confidence in the results reached by the federal courts that Judges Kennedy and Wallace candidly expressed in their concurring opinions below. *See* 573 F.2d at 1136.

Since original claims in the federal action are still pending in the district court, the decree entered by Judge Boldt in 1974 unquestionably was not final and its underlying determinations remain open to plenary review. *See, e.g.*, Fed. R. Civ. P. 54(b); *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82 (1922). Even if the decree had become final, this Court would not be barred from reaching the treaty interpretation issues, especially on behalf of the non-treaty fishermen who were not parties to the earlier proceedings and cannot be held bound by them.[1]

Furthermore, these federal issues were properly reached in the State proceedings instituted by the fishing associations and the State cases are now properly here on direct review. The State courts were not obliged to defer to the rulings of the lower federal courts, even on the federal issues, and the State supreme court's ruling on the state law issues is conclusive.

[1] Contrary to the assertions of the separate brief of the Yakima Nation, the fishing associations' Petition in No. 78-139 was not out of time. The Petition was filed on Monday, July 24, 1978, not (as claimed by the Yakimas) on July 26, 1978. Although this was 91 days after entry of the Court of Appeals' judgment, Rule 34 of this Court's rules extends the 90-day period for filing a petition for certiorari one day when the last day of the period would otherwise be a Sunday.

2. The Indians attempt to gloss over the fact that, as a result of present economic conditions and the impact of Judge Boldt's apportionment program, this controversy is a commercial dispute of great economic significance for *all* parties. While contending, somewhat inconsistently, that this program has occasioned measurable economic gains for the Indians, respondents attempt to belittle the preference accorded the Indians by apportionment and to ignore its cost to the non-treaty fishermen. As we pointed out in our opening brief (at 10 n.5), there is scant evidence in the record concerning the program's economic impact on the non-treaty fishermen, since they were not parties to the original federal proceedings, and were expressly denied the opportunity to submit such evidence when the district court peremptorily extended its decrees to them. *See* JA 483 (¶ 4), 538-41.

Although the Indians presently take less than 50% of all the fish landed in the State of Washington, many of those fish are of non-Washington origin, and the comparison, therefore, has no relevance to the issues before the Court. This case concerns only the competition for fish harvestable at the Indians' accustomed grounds. Furthermore, the true impact of the federal decisions below must take into account the additional quantity of fish that will be taken by the Indians if the apportionment program is sustained and the Indians develop the power to exploit their 50 percent share in full.[2]

3. When the government and the tribes finally reach the merits, their arguments to support the preference for Indian fishing ordered by Judge Boldt rest on selective assertions of fact—many not accepted by the district judge himself—and on an imaginative rewriting of history and this Court's precedents. While the government is somewhat more candid in admitting

[2] As the Indians concede (Brief of Respondent Indian Tribes at 103 n.294 [hereinafter cited as "Ind. Br."]), they presently take nowhere near 50 percent of the fish in the IPSFC fisheries. United States fishermen land several millions of fish in these fisheries annually.

that an apportionment was never contemplated by any party to the treaties and that the 50-50 allocation decreed below cannot, in any event, be regarded as inevitable, the Indians would have the Court believe that there is a basis in the record or in other historical evidence for compelling this result. Despite the prolixity of the respondents' briefs, however, the simple and irrefutable facts are these:

a. When the tribes ceded any claims that they had to ownership of the land in question, they reserved only a right to fish "in common" with citizens of the Territory at their usual and accustomed fishing sites.

b. Nothing in the text of the treaties or the negotiations leading to them contemplated the imposition of restrictions on fishing by non-Indians, especially at non-Indian sites, in order to assure a particular quota of fish for the Indians.

c. There are *no* findings of fact by the district court that either party to the treaties understood that under the treaties the Indians were extending only so-called "user rights" to the settlers to fish at the Indians' accustomed sites. On the contrary, the findings are that:

> "The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, *but* that the white man also would be allowed to fish." 384 F. Supp. at 355, JA 109 (FF 20) (emphasis added).

And:

> "Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that *either* party intended to restrict the other party's fishing because it was not contemplated that they would interfere with each other." *Id.* at 357, JA 113 (FF 28) (emphasis added).

Thus, the actual findings below are that the Indians did *not* seek or obtain the right to exclude or limit fishing by non-Indians by granting the citizens only "user rights" or by any other means.

d. The concept of "user rights" in the tribes' tradition depended on ownership. Since the Indians were ceding ownership of their usual and accustomed off-reservation fishing sites, it would only have been natural for them to regard the opportunity to fish in common with the settlers as the extension to *them*, the Indians, of revocable "user rights," not the other way around. The treaty guarantee of "common" fishing rights was intended only to counteract this assumption.[3]

e. No nineteenth century fishing treaty, including the 1818 treaty between the United States and Great Britain, has been construed as either permitting or requiring a 50-50 apportionment of fish between the two signatories.

f. To the extent that conditions of scarcity in the last 125 years have undercut the relative productivity of Indian fishing at off-reservation sites, these are problems that the treaties do not cover and that can be addressed only by legislative action, not by judicial reformulation.

4. The prior decisions of this Court interpreting the Stevens treaties dictate the proper result in these cases. As this Court settled long ago, the clause allowing the Indians to take fish in common with the citizens of the Territory is essentially a guarantee of physical access, not the creation of a right to exclude non-Indians from competing with Indian fishermen. The treaties merely "fixe[d] in [this] land such easements as enable the right [to fish] to be exercised." *United States* v. *Winans*, 198 U.S. 371, 384 (1905). This easement permits the

---

[3] *See also* 384 F. Supp. at 256, JA 111 (FF 24): "The Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon."

Indians to share off-reservation fisheries with other citizens. But Indians do not have priority rights to the resource when it becomes scarce, and have no right, contrary to what the federal courts below have effectively ordered, either to exclude non-Indians from equal access to these sites or to demand limits on fishing at sites not even covered by the treaties.

In addition, *Winans* and other decisions settle that the Stevens treaties bestow individual rights on non-Indians as well as Indians, "as though named therein," *id.* at 381, and that these rights are of equal dignity. *See also Puyallup Tribe* v. *Department of Game of the State of Washington,* 391 U.S. 392, 398 (1968) ("*Puyallup I*"); *Department of Game of the State of Washington* v. *Puyallup Tribe,* 414 U.S. 44, 49 (1973) ("*Puyallup II*"); *Puyallup Tribe, Inc.* v. *Department of Game of the State of Washington,* 433 U.S. 165, 176 & n.16 (1977) ("*Puyallup III*"). These principles require the rejection of any apportionment that burdens one group for the benefit of another.

The *Puyallup* cases also demonstrate that this Court has already resolved the problem that the apportionment decreed below is intended to solve: the unanticipated relative scarcity of the resource. The *Puyallup* cases hold that, in modern times of relative scarcity, State conservation regulations may lawfully be applied to *all* fishermen, including treaty Indians, so long as the regulations are non-discriminatory. This Court's holdings in the *Puyallup* trilogy have forced even the tribes to concede this point, albeit reluctantly. Ind. Br. at 172 n.399. In *Puyallup I* this Court noted that the Indians' easement continues despite changes in ownership of the lands. 391 U.S. at 397. But several paragraphs later the Court carefully explained that the Indians' rights under the treaties do not permit them to exclude competitors:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly

> the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State." *Id.* at 398.

See also Tulee v. *Washington,* 315 U.S. 681, 684 (1972).

Thus, rather than require the State to accord preferential treatment to Indians, this Court's earlier cases establish that the Stevens treaties bestow individual rights that must be given equal respect in the regulation of a scarce resource. Nothing in the treaties prohibits the State from imposing similar conservation regulations on Indian fishermen or requires that the regulatory system be structured to give Indians a preferential right to harvest.

5. In order to avoid the force of the incontrovertible facts and this Court's precedents, the respondents indulge in several fictions to frame their arguments.

a. The decision in this case turns on the meaning of the treaty language "in common with." The Indians weave their first fiction when they assert that this language simply creates a *license* granted by the Indians to the non-Indian settlers to use off-reservation lands for fishing, while the Indians reserved special priorities. The United States government wisely does not support this argument, since the text of the treaties and the events surrounding their negotiation contradict it. The Indians were ceding ownership claims over all lands other than those set aside for their reservations. They were understandably concerned about securing access to their traditional, off-reservation fisheries, so that *they* could continue to fish at sites that could otherwise have been closed to them. As *Winans* shows, a right of *equal access* is what they sought and what they received.

b. The Indians construct a second fiction by mischaracterizing our fundamental arguments. Despite their description of our position, we do not suggest that the treaty and non-treaty fishermen are on equal footing *vis-a-vis* all State

regulation. We have recognized from the outset that treaty Indians, as wards of the federal government, effectively enjoy greater freedom to fish than other citizens in *some* respects. Petitioners' Br. at 28 n.18.[4] This is not because Indians have preferential rights to a successful catch under the treaties, but merely because, without congressional authorization, the State's otherwise *plenary* powers to impose affirmative restrictions on fishing extend in *full* force only to non-Indians.

Nonetheless, we are not asking this Court to expand the State's jurisdiction over Indian affairs. Our position is that a just accommodation of non-exclusive rights is achieved if the State's regulations treat all individual fishermen equally, as called for by the *Puyallup* decisions.

c. The respondents' third fiction would have the Court ignore the individual fishermen in this litigation—non-Indians and Indians alike—and confine its inquiry to the activities and interests of "the Tribes" and the State. But the Court is adjudicating the right to fish, and the realities are clear: *Individual* Indians, not tribal entities, fish. *Individual* citizens, not States fish. The treaty negotiations occurred between spokesmen for the tribes and the Territory, but the rights secured were for the benefit of the individual members of these political entities "as though named therein." *United States* v. *Winans, supra,* 198 U.S. at 381.[5] Thus, the effort to justify a 50-

[4] *See United States* v. *Winans, supra* (Indians cannot be excluded from fishing at usual and accustomed sites when the land is acquired by private owners under license of the State); *Tulee* v. *Washington, supra* (treaty Indians are immune from state licensing requirements which are otherwise applicable to the State's fishermen).

[5] Indeed, in *Puyallup III*, this Court noted that the position of the Puyallup Tribe is distinct from that of its members. Although the State, therefore, could not enforce its regulations against the tribal entity, it did have authority to adjudicate the rights of individual members of the tribe. This distinction explains the basis for the State's acknowledged conservation-based regulatory authority over treaty Indians.

50 apportionment between two groups on whose behalf the treaties were negotiated rests on a transparently artificial formality.

d. In a related, creative effort to sustain the 50-50 allocation, the respondents paint the tribes with a royal brush. They ambitiously transform what the district judge described as fragments of tribes into sovereign nations. *See* 384 F. Supp. at 354, JA 107 (FF 17). Indeed, the district judge found that no political structure even existed among the Indians prior to the negotiations with Governor Stevens. *Id.* at 355, JA 108 (FF 18). The numerous bands of Indians in the Washington Territory were organized by Governor Stevens into political entities for the very purpose of negotiating the treaties. Even after adoption of the treaties, the respondents admit that the powers of these "tribes" were no more than those of a quasi-sovereign. *See* U.S. Br. at 66; Ind. Br. at 143 n.379.

Thus, there is little rational basis for attempting to draw an analogy premised on fishing treaties negotiated between the United States and foreign governments. The respondents' elaborate and misleading discussion of the 1818 treaty with Great Britain adds nothing to their position. Neither party to that treaty ever argued, and no international tribunal ever ruled, that the right of equal access enjoyed by the nationals of each country justified any apportionment of the fishery, let alone a 50-50 allocation. The decisions of the federal courts below are truly unprecedented.

ARGUMENT

I. THE 50-50 ALLOCATION ORDERED BY THE COURTS BELOW CANNOT STAND.

The central issue before the Court is the propriety of the 50-50 apportionment and the preferential treatment that it necessarily entails for treaty Indians. In our view, no apportionment can be reconciled with the treaties' guarantee of equal individual access to the Indians' traditional fishing grounds.

A. The Stevens Treaties Accord Individuals Equal Rights To Compete For Fish.

Judge Boldt essentially decreed that the treaties required an allocation of fish as a matter of law in light of a contemporaneous dictionary definition of the term "common." 384 F. Supp. at 343, JA 88-89. The district judge apparently believed that the Indians are entitled to preferential treatment because, in his view, they enjoy fishing "rights," while non-Indian fishermen have mere "privileges." *Id.* at 332, JA 70. The court of appeals, on the other hand, recognized that the Stevens treaties "granted equal rights at the traditional [fishing] areas to Washington citizens . . . ." 520 F.2d at 689, JA 53. The court, nonetheless, analogized the treaty parties' rights to a cotenancy subject to partition on equitable grounds. 520 F.2d at 686 n.3, 687, JA 48-49. The court of appeals affirmed, despite the fact that Judge Boldt had reached his conclusions solely as a matter of law and not as an exercise of any equitable discretion.

We showed in our opening brief (at 27-35) that neither rationale is sound and that the treaties, in fact, grant individuals, whether Indians or non-Indians, equal rights to compete for fish. It follows that any apportionment stands the treaties' guarantee of common access on its head and, indeed, violates principles of equal protection so long as it creates a preference for members of one racial group over those of the other.

The Indians reply that apportionment is proper as a matter of treaty interpretation, as if the treaty parties had anticipated the problem of scarce resources and expressly resolved it. Ind. Br. at 122-35. Even the government, however, acknowledges that "none of the treaty negotiators anticipated the need for restrictive regulations, whether to protect the survival of the run or to assure that both Indians and non-Indians enjoyed a fair share of the fishery." U.S. Br. at 59. Essentially conceding the legislative nature of the apportionment decreed below, the government supports apportionment merely as a solution to the "[p]ractical" problem of "a contingency not envisaged." *Id.* The fact that even today the respondents, like the federal courts

below, are unable to settle on a consistent theory of the case only betrays the absence of any principled foundation for any apportionment at all.

In any event, both respondents assert that the Indians' fishing rights are, in the government's terms (at 64), "special," so that the Indians are entitled to exclude non-treaty fishermen from fishing at the Indians' accustomed sites and even to limit their fishing elsewhere.[6] The government advances this proposition with understandable diffidence, suggesting that the result "would seem to" follow from *Winans* and the *Puyallup* cases. U.S. Br. at 61. The government's analysis, however, would turn the equal protection provided by this Court's precedents for individual fishing rights into an instrument for discrimination itself.

The tribes principally pitch their argument for preferential rights on a proposition of fact—that the Indians understood the treaties to extend only inferior "user" rights to the citizens of the Territory. The government wisely does not support this claim. It is contrary to the historical record and, indeed, to the district court's own findings of fact.

The arguments for superior rights on the part of the treaty Indians falter on a more fundamental difficulty. If the claim for preferential treatment were valid, it might, as the Indians ambitiously argue, entitle them not merely to half of the fish, but to an absolute priority to satisfy all their desires. Yet even the government understandably shrinks from that conclusion. *See* U.S. Br. at 65. It is simply irreconciliable with this Court's precedents.

1. The Historical Record In This Case Confirms That The Treaty Parties Intended No Preference For Indian Fishing.

The Indians purport to review the historical context in which the Stevens treaties were negotiated, but their version of the facts is misleading and incomplete in the extreme. A full picture of the treaty negotiations, its antecedent events, and the

---

[6] *See also* Ind. Br. at 247 n.473.

"assumptions of those who drafted" the treaty language[7] unquestionably reveals that respondents have turned history inside out. Far from obtaining the right to exclude others from vigorous competition, the Indians were concerned simply with insuring their continued access to certain sites where incoming settlers would soon also be fishing, and in greater numbers. The Indians' contrary argument is based on unfounded assertions actually rejected by the district court.

a. The Indians' Claims Are Inconsistent With The Historical Record On Which The District Court's Findings Are Based.

Congress carved the Washington Territory out of the Oregon Territory in March of 1853. Act of March 2, 1853, 10 Stat. 172. The Appropriation Act of March 3, 1853, 10 Stat. 226, 238, authorized the President to negotiate with tribes in this Territory to obtain their peaceful acceptance of white settlements and to secure the extinguishment of their claims of title to the land. The Donation Act brought homesteaders into the Territory, and they asserted land claims in the area even though treaties had not yet extinguished the Indians' rights. JA 109. Isaac Stevens, Governor of the Territory, was then appointed to negotiate treaties with the various bands of Indians. 384 F. Supp. at 353-55, JA 106-08 (FF 15-17). In order to accomplish this, he organized these bands into political groups. 384 F. Supp. at 354-55, JA 107-08 (FF 17-18).

It is at this critical juncture that certain documents passing between the treaty negotiators become relevant. The Indians' selective quotes from these documents tell only half the story. *See* Ind. Br. at 127-32. Disclosure of the other half will set the record straight.

In his report to Captain McClellan on March 4, 1854, George Gibbs (who introduced the phrase "in common with" into the treaties[8]) wrote that the Indians of the Northwest were

[7] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).
[8] 384 F. Supp. at 356, JA 110 (FF 23).

different from prairie Indians who had to reside on vast open spaces to facilitate their custom of hunting grazing buffalo. In contrast, the Northwest Indians sought, in various seasons, berries, fish, and roots. They "require the liberty of motion, . . . but they do not need the exclusive use of any considerable districts." Accordingly, Gibbs proposed securing small tracts of land where the Indians could raise vegetables and bury their dead *without fear of being "driven off."* And, he said, "[*i*]*n like manner,* the use of their customary fisheries . . . should be secured." With respect to these fisheries, both Stevens and Gibbs foresaw that difficulties with the settlers might arise if their ownership of the land gave them a basis for excluding Indians from traditional fishing grounds. JA 326, 327 (emphasis added). *See also* 384 F. Supp. at 356-57, JA 112 (FF 25).

The drafters, therefore, inserted in the treaties language that gave the Indians the right to fish despite their lack of ownership of the sites that they had customarily used. Henceforth, the Indians could fish in common with—together with—settlers. This gave the Indians an easement to fish upon the land that they had ceded. No further or broader rights were sought or given that would permit the Indians to insist upon a restriction of the rights of others to fish.[9]

Several other documents compel this conclusion. James Doty, Secretary to the Commissioner of Indian Affairs, reported on December 26, 1854, that it was appropriate to give the Indians the right to fish, "since this would not in any manner interfere with the rights of citizens." JA at 327. Governor

[9] Significantly, a paper by George Gibbs reveals his belief that, even among themselves, the Indians did not have any "priority" interests in the fisheries:

> "[A]s regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seigniorage for the right of taking." JA 333

See also 384 F. Supp. at 357, JA 112 (FF 25).

Stevens expressed similar sentiments in his letter of December 30, 1854, to George W. Mayberry, Commissioner of Indian Affairs. His concern for meeting the Indians' interests was conditioned upon avoiding any interference with the claims or settlements of the non-Indians:

> "The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants, and to the part they play and ought hereafter to play in the labor and prospering of the territory. It may be here observed that their mode of taking fish differs so essentially from that of the whites that *it will not interfere with the latter.*" JA at 329 (emphasis added).

In the course of negotiations, one Indian expressed the fear that he would become poor if he were to lose the right to fish where he wanted. Stevens responded that "he wanted them to fish but that the whites should fish also." JA at 331. And in a May 1855 journal entry Stevens described the treaty right as follows:

> "[The Indians] would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the mountains for berries, always provided that they were to remain upon their reservation when required, and were in *no manner to interfere with the whites when off of it.*" JA at 331-32 (emphasis added).

These documents reveal that the negotiators hardly envisioned the treaties as creating for the settlers only a conditional license to fish, with the Indians retaining preemptive rights.

On the contrary, the treaties included the proviso "in common with" to prevent exclusion of the Indians from fishing at their usual and accustomed grounds. The Indians ceded to the United States all rights and title to the off-reservation land,

except for the right to enter the land to take fish, hunt, and gather berries, as explicitly reserved in the treaties. Had they not reserved these rights, then, as recognized by Stevens and Gibbs, the settlers could have lawfully excluded the Indians from fishing off the reservation. At the same time, as shown by the documentary evidence, the negotiators stressed that the right being given to the Indians would not interfere with the settlers' interests, including their opportunity to fish as intensely as they chose to.

In short, rather than conceding a priority right to the Indians, the treaties simply reserved an equal right to the Indians to fish at their accustomed sites. There is absolutely no contemporary evidence that the government negotiators communicated, or that the Indians understood, anything other than this. Indeed, Stevens told the Indians precisely that "he wanted them to fish but that the whites should fish also." The district court's orders, of course, frustrate that avowed expectation that the non-Indians would not have to give way to the desires of Indian fishermen.

b. The Indians' Claims Are Inconsistent With The District Court's Findings Of Fact.

The Indians rest their historical presentation not on primary evidence, but on the opinion testimony of the government's expert anthropological witness, Dr. Barbara Lane. In particular, the Indians single out Dr. Lane's testimony to the effect that, in her opinion, the Indians must have understood the Stevens treaties to accord the citizens of the Territory mere "user" rights that would be subject to the Indians' prior ownership rights. *See* Ind. Br. at 20-22, 131. The Indians also suggest that "there were no words in the Chinook jargon for 'common' or 'with'" that could have been used to convey a contrary meaning. *See id.* at 133.

Dr. Lane's opinion is on its face self-defeating and the district court did not accept her anlaysis on that issue. According to Dr. Lane, the extension of "user" rights was viewed in

Indian tradition as an incident of ownership. But ownership of the off-reservation land is what the Indians were ceding. Thus, they could not view the settlers as possessing merely revocable, subordinated "user rights" once full ownership of the land passed beyond the Indians' hands. What the treaties assured the Indians, therefore, was the confidence that the settlers would allow them to continue to fish at sites that could otherwise have been closed to them at will. Thus, even when viewed with Indian concepts in mind, the Indians could not have believed that they were obtaining the right to demand the restriction of fishing by non-treaty fishermen at any off-reservation sites.

There are no findings of fact by the district court that any party believed that the Indians under the treaties were only extending "user" rights to the citizens of the Territory.[10] On the contrary, the relevant findings are that:

> "The Indians were assured by Governor Stevens and the treaty commissioners that *they would be allowed to fish, but that the white man also would be allowed to fish.*" 384 F. Supp. at 355, JA 109 (FF 20) (emphasis added).

And:

> Although "[t]here appears to be no phrase in the Chinook jargon that would interpret the term ["in common with"] in any exact legal sense," "[*t*]*he Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon.*" *Id.* at 356, JA 111 (FF 23-24) (emphasis added).

[10] Although the district judge did generally credit the bulk of Dr. Lane's testimony, 384 F. Supp. at 350, JA 99 (FF 2), he notably failed to adopt what otherwise would have been a critical basis for his ruling. In fact, her opinion on the "user rights" question is flatly inconsistent with the specific findings discussed in the text.

The Indians' present assertions are directly at odds with these findings.[11]

The Indians also emphasize Dr. Lane's opinion that "it is likely that the United States treaty commissioners foresaw the need for [conservation] restrictions, although they did not contemplate that the Indian fisheries would be restricted." Ind. Br. at 28. The Indians conveniently omit the fact that Dr. Lane's opinion concerning the contemplated need to regulate Indian fishing was confessedly "in the realm of speculation . . . ." JA 262. The Indians also repeatedly stress that "[t]he State's own anthropologist [Dr. Carroll Riley] testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing." *Id.* at 132. *See also id.* at 24, 129. But they ignore the basis for Dr. Riley's testimony:

> "that as of 1855 the number of Indians was so small—in fact, even the number of settlers was so small—that there was no vision on the part of the treaty commissioners about the possible necessity of restricting the fisheries." JA 298.

The witness was explaining why *none* of the parties contemplated the prospect that *any* fishing would have to be restricted, whether by Indians *or* non-Indians.

Significantly, in their brief the Indians neglect to mention the district judge's actual findings:

> "Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that

[11] The Indians repeatedly quote Governor Stevens' statement at the negotiations of the Treaty Point No Point that "[t]his paper secures your fish," JA 331, as if this somehow recognized the superiority of the Indians' rights under the treaty. But it is evident that Governor Stevens meant no more than what the district court found: The Indians "would be allowed to fish, but . . . the white man also would be allowed to fish."

either party intended to restrict the other party's fishing *because it was not contemplated that they would interfere with each other.*" 384 F. Supp. at 357, JA 113 (FF 28) (emphasis added).

Contrary to the Indians' portrayal, therefore, the judge rejected the inference from Dr. Lane's testimony that the government deliberately freed Indian fishing even from conservation regulation — a position, incidentally, unequivocally rejected by this Court's prior decisions. *See, e.g.*, pp. 21-24 & n. 18, *infra.*

The finding that no one claimed or contemplated the right to restrict the fishing rights of others is devastating to the Indians' historical argument. It is inconceivable that a priority right could have been intended for anyone if conditions of scarcity were not even contemplated.[12] Since scarcity was not anticipated, there simply is no basis for assuming that the Indians believed they were receiving a priority right to take fish throughout the Puget Sound area, rather than simply the perpetual right of access to their accustomed fishing sites "in common with citizens of the Territory."

Finally, the Indians similarly misapply Dr. Lane's testimony that the United States intended the Indians to continue to fish both to sustain themselves and to promote the economy of the Territory. *See* Ind. Br. at 19, 152. There was no hint that Indian fishing was to occupy a place of primacy or that it was to displace the economic equality of non-Indian fishermen. The district judge's actual findings are as follows:

> "It was the intention of the United States Government, in negotiating treaties with the Indians, to make at least noncoastal tribes agriculturists, although not to restrict them to that, to diversify

[12] This lack of foresight is repeatedly confirmed in the findings of both the district court and the court of appeals, *see* 384 F. Supp. at 333, 352, 355, JA 72, 102-03, 109 (summary of findings & FF 8, 9, 20); 520 F.2d at 687, 689, JA 50, 52, and, indeed, is conceded by the United States. *See* p. 10, *supra.*

> Indian economy, to teach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain." 384 F. Supp. at 355, JA 109 (FF 21).

2. Far From Supporting Preferential Fishing Rights For Anyone, This Court's Precedents Direct That Discrimination Against Individuals Cannot Be Countenanced Under The Stevens Treaties.

The respondents seek to transform cases that prevent certain types of interference with fishing by treaty Indians into support for a right to insist that the State (or the federal government) interfere with the fishing rights of non-treaty fishermen. The attempt to convert a shield into a sword involves little fidelity to the treaties or to the cases interpreting them.

Virtually all the treaties, after all, provide fishing rights at the Indians' accustomed sites for "said Indians, in common with all citizens of the Territory." This language, including the reference to "all" citizens, is most naturally read to create common individual rights of access to what had been the Indians' accustomed fishing sites, sites that were being transferred to the United States on behalf of the migrating settlers. This understanding precludes any apportionment of fishing opportunity at all. This Court said as much in its seminal decision in *United States* v. *Winans, supra.*

In *Winans* the land owners argued that, despite the treaty language, the Indians could be excluded from fishing at their traditional grounds:

> "Respondents contend that the words 'the right of taking fish at all usual and accustomed places in common with the citizens of the territory' confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the

> river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power *to exclude* the Indians from the river by reason of such ownership." *Id.* at 379 (emphasis altered).

The Court rejected this claim, stating that "[t]he contingency of the future ownership of the lands . . . was foreseen and provided for . . . ." *Id.* at 381. The Court held that treaty Indians enjoyed an easement to their accustomed sites that "was intended to be continuing against the United States and its grantees as well as against the state and its grantees." *Id.* at 381-82.

According to that interpretation, the Indians obtained a substantial right that they would not have had in the absence of the treaty—a right of access to streams and rivers that could not be cancelled by the government or its grantees to whom the fishing grounds might be sold. But this did not translate into a right for the Indians to exclude others from competing with them at those sites or elsewhere. On the contrary, the Court stated that the right to fish "in common" was "not exclusive in the Indians. Citizens might share it . . . ." *Id.* at 381.[13]

The Court also expressly recognized in *Winans* that Indians under these treaties are subject to certain even-handed

[13] Significantly, the equality of treaty rights under *Winans* was an equality among individual citizens and Indians, not one between sovereign or quasi-sovereign entities. The Indians now argue that the references to individual Indians and citizens in the Stevens treaties are shorthand for the tribes and the government, particularly since the Yakima Treaty specifically states that fishing rights are secured to "said confederated tribes and bands of Indians." Yet it was precisely this language that the Court was addressing in *Winans* (*see* 198 U.S. at 378) when it declared that although "the negotiations were with the tribe," "[t]hey reserved rights . . . to *every individual* Indian, as though named therein." *Id.* at 381 (emphasis added). The Indians' argument that the Stevens treaties should be construed by analogy to the aberrant language of the Yakima Treaty thus flies in the face of *Winans* holding exactly to the contrary.

State regulation just as competing non-treaty fishermen are. The treaties' protection of the Indians' right to fish does not "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." *Id.* at 384.[14]

Winans does indicate that State power over fishing by treaty Indians is limited, but this limit on State power does not imply that treaty Indians have the right to demand official restrictions on non-Indian fishing. *Winans* explains that, under the "equal footing" doctrine, the State of Washington entered the Union with the same plenary powers as the original States, subject, however, to previously created rights that Congress intended to endure, such as the Indians' easement to their accustomed sites. *Id.* at 382-84. As a result, when Washington was admitted to the Union, it acquired plenary police power over its non-Indian citizens, including the power to limit their fishing rights, but the Indians remained under special federal protection. The Indians' limited federal immunity from certain types of State regulation, however, is a far cry from a right to demand that the State *impose* regulations on non-Indians fishermen.

The *Puyallup* cases merely apply *Winans* in a modern setting. Thus, *Puyallup I* recognizes the basic equality of rights created by the Stevens treaties. The Court held, first, that when confronted by a depletion of its natural resources, the State may

[14] *Tulee* v. *Washington*, *supra*, clarifies the reach of these state powers. The appellant there, a member of the Yakima tribe, refused to obtain a license to fish for salmon with a net, as state law required. The court ruled that the treaty fishermen were exempt from this license requirement:

> [W]hile the treaty leaves the state with power to impose on Indians, *equally with others*, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging a fee of the kind in question here." 315 U.S. at 684 (emphasis added; footnote omitted).

impose conservation regulations on all its citizens—Indian and non-Indian alike:

> "[T]he right to fish at those [accustomed] places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly *the right* of the latter may be regulated. And we see no reason why *the right* of the Indians may not *also* be regulated by an appropriate exercise of the police power of the State." *Id.* at 398 (emphasis added).

At the same time, the Court explicitly recognized the guarantee of "equal protection implicit in the phrase 'in common with,'" *id.* at 403, by insisting that any such regulation be non-discriminatory. *Id.* at 398.[15]

Again expressly acknowledging that Indians *and* other people have treaty "rights," the Court in *Puyallup II* held that a conservation program is discriminatory if "all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." 414 U.S. at 48, 49. Although a formal equality of fishing opportunity existed in that the Indians could engage in hook-and-line fishing along with everyone else, while no one could engage in net fishing, the effect of the State's conservation program was to discriminate against the Indians. Only in those circumstances did the Court tolerate an apportionment of fish as a remedy:

> "*If* hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, *then* that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned." *Id.* (emphasis added).

[15] By contrast, the Court found that the treaty at issue in *Antoine* v. *Washington*, 420 U.S. 194, 206 (1975), did not afford non-Indians any rights of equal dignity.

Thus, *Puyallup II* merely sustains apportionment as a form of judicial relief from discrimination by the State in its conservation program. The apportionment in this case cannot be supported on that ground.[16]

Finally, in *Puyallup III*, the Court affirmed a specific allocation of fish to remedy the discrimination identified in the prior decision, but only after reiterating that the Indians' treaty rights are not "exclusive," *id.* at 175, and that "the non-Indian citizens of Washington" also have "rights" under the treaty, *id.* at 176. After repeating the treaty language, the Court explained:

> "As to the treaty fishermen, this sentence effects a reservation of a previously exclusive right. But that language also recognizes that *the right is to be shared*

[16] The United States does not claim otherwise. Judge Boldt did state that "[t]he application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the [reason, *among others*, that] . . . they operate to discriminate against the tribes' treaty right to fish . . . ." 384 F. Supp. at 403, JA 199 (Conclusion 38).

That loose reference to "discrimination", however, is simply another way of stating the judge's conclusion that Indians may not be subjected to regulation, including even-handed regulation, if the effect is to prevent them from taking half of a particular run. These assertions of discrimination *assume* the issue to be decided: whether the State is obliged to impose special restrictions on fishing by non-treaty fishermen in order to assure Indians a particular volume of fish at their usual and accustomed sites. The court of appeals did not rely on any notion of discrimination in upholding the apportionment here.

Moreover, the apportionment ordered by Judge Boldt is not tied to remedying specific instances of discrimination, but rather governs the entire reach of Indian fishing, irrespective of any prior discrimination. *See* pp. 25-30 *infra*. As discussed in our opening brief (at 33-34), by over-extending a limited remedial measure, he has misallocated to the federal judiciary the discretionary authority to upset the equality of rights established by the Stevens treaties and to intrude upon the regulatory authority that the State may exercise to preserve the resource.

in common with the non-Indian 'citizens of the Territory.'" *Id.* at 176 n.16 (emphasis added).[17]

In sum, this Court's precedents confirm the historical evidence that Indians and non-Indians are entitled only to equal access to fish under the Stevens treaties; the right guaranteed by the Stevens treaties "only fixes in the land such easements as enable the right [to fish] be exercised." *United States* v. *Winans, supra,* 198 U.S. at 384. Rights of access are flatly inconsistent with any apportionment whatsoever. In addition, *Winans* and the *Puyallup* cases establish that both the individual citizens of the Territory and the Indians were the intended beneficiaries of these treaties "as though named therein," 198 U.S. at 381, and that their respective rights are of equal dignity. Any disproportionate apportionment is fundamentally at odds with these principles.

Finally, *Tulee* and the *Puyallup* trilogy also demonstrate that this Court has already established the pattern for reconciling the treaty language with modern conditions of scarcity by holding that reasonable conservation regulations can be "imposed on Indians equally with others." *Tulee* v. *Washington, supra,* 315 U.S. at 684. This is an equitable interpretation and resolution of the problem of scarcity for parties who have equal rights of access under the circumstances of this case.

---

[17] As the government points out (U.S. Br. at 66-67), the Court did state in *Puyallup III* that the State "has no interest in how the catch is allocated among the Indians . . . ." *Id.* at 178. But this does not diminish the individuality of the fishing rights recognized by the Stevens treaties. Of course, the State has no interest in intra-tribal allocation. As *Winans* teaches, our federal system accords it no regulatory power over that process.

This does not mean that the right to fish belongs any the less to *individuals.* Indeed, the Court underscored the individual nature of this right in *Puyallup III* itself in ruling that the state courts were authorized to adjudicate the treaty rights of individual defendants over whom the courts had personal jurisdiction even if the tribe itself enjoyed sovereign immunity. *See id.* at 171, 173. *Puyallup III* in no way retrenches on the *Winans* principle of individual rights.

3. The Apportionment Improperly Grants Preferential Rights To Indians Without Regard To Any Discrimination Against Them.

Although the Indians try to paint a picture of special hardship, the fact is that the massive dislocation decreed by the district judge does not correct discrimination and, indeed, tips the competitive scales sharply in favor of Indian commercial fishermen.

(a) The district judge found (FF 217; JA 179-80) that under State regulations there were "many instances" in which a large portion of the harvestable number of fish from given runs could be taken by persons with no treaty rights before such runs reached many of the plaintiff tribes' usual and accustomed fishing places. The Indians point to that geographical possibility as a basis for supporting an allocation of the entire fishery. That approach, however, conflicts with the standards of the *Puyallup* trilogy.

The possibility that some successful fishing takes place before a run reaches *some* Indian sites does not support an apportionment of the entire fishery. Moreover, even assuming *arguendo* that the treaties operate to restrict geographically earlier interceptions, many of the interceptions to which the district judge referred are made by the treaty Indians themselves. The district judge's own findings reflecting the locations of each of the tribe's usual and accustomed fishing grounds[18] shows that most of these grounds, including most of the largest ones, are located in salt water areas where non-Indian net fishing also takes place. Thus, treaty Indians have an equal opportunity to "intercept" some of the fish that might otherwise reach *other* Indian sites upstream. One obvious example is the

---

[18] FF 39, 45, 46, 48, 50, 51, 58, 65, 67, 76, 86, 99, 108, 120, 121, 131, 137, 141, 146, 148, 154, 159, and 459 F. Supp. 1038, 1049, 1059 and 1060.

Strait of Juan de Fuca, where eight of the nineteen treaty tribes have usual and accustomed sites. *See* Ind. Br. at 232 n.464. Indian fishermen from these eight tribes are among the first fishermen in Washington waters to intercept fish in their migratory flow through Puget Sound.

The findings describing the usual and accustomed fishing grounds also reflect that every body of salt water in the Case Area into which treaty fishing streams flow, such as Puget Sound, the Strait of Juan de Fuca, and the Washington coastal waters, is a usual and accustomed fishing ground for several tribes. Thus, to the extent that there are any interceptions of fish going to the terminal area fishing grounds up-river, tribal Indians fishing at their usual and accustomed fishing grounds in the salt water areas contribute significantly to such interceptions. These competitive conditions, therefore, provide no legitimate pretext for apportioning the entire salmon fishing in Washington as if there were massive discrimination against Indian fishermen within the meaning of the *Puyallup* trilogy.

(b) Moreover, the district judge's allocation, enforced by closing the fishery to non-treaty fishermen, is manifestly discriminatory. For instance, even though the interceptions about which the district judge was concerned involve sport fishermen and commercial fishing beyond the Washington coast (JA 167-68, 174, 346-47), the burden of the judge's orders fall on petitioners, the Puget Sound fishermen. One of the most flagrant inequities of the district judge's decision is the treatment of the non-treaty fishermen in the Fraser River fishery. This fishery takes place in the Strait of Juan de Fuca and the waters surrounding the San Juan Islands in northern Puget Sound, which, as we have noted, are the usual and accustomed fishing grounds of eight of the nineteen tribes having recognized treaty rights in this case. The major sockeye and pink salmon stocks pass through these waters from the Pacific Ocean on their way to the Fraser River in Canada. Each year since

1975, fishermen of these eight tribes have been allowed more fishing time here than non-Indians.[19]

Yet, as we have explained, there is obviously no discrimination against treaty Indians in this fishery to justify a remedy similar to that approved in *Puyallup II*. There are no significant interceptions of these fish by Washington citizens before they enter this fishery. In fact, the first fishermen having access to these fish in Washington waters are the Makah tribal fishermen whose reservation is located on the northwesterly tip of the State of Washington where the Strait of Juan de Fuca begins.[20]

The substantial edge given to Indian fishermen by allotting them extra fishing days free of non-Indian competition is a glaring example of reverse discrimination against non-Indian fishermen. The individual Indian catch rates have been substantial. The Indian purse seine fishery is a case in point.

---

[19] *See* U.S. Br. 36. In 1977 and 1978, consistent with the district judge's order, the Bureau of Indian Affairs (BIA) adopted special Indian fishing regulations substantially increasing Indian fishing time over that permitted by IPSFC regulations for non-Indians. "This matter continues to be administered under federal regulations," U.S. Br. at 43, suggesting similar special fishing regulations for Indians in the future unless changed by this Court. 1977 IPSFC Regs., 42 Fed. Reg. 30841; 1977 BIA Regs., 42 Fed. Reg. 31450; 1978 IPSFC Regs., 43 Fed. Reg. 26737; 1978 BIA Regs., 43 Fed. Reg. 27187.

[20] The effect of interceptions by the non-treaty ocean sport fishery, inshore troll (kelpers) fishery, and offshore troll fishery before fish even enter the Strait of Juan de Fuca is not legally or factually relevant. Under the Fisheries Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, the United States regulates the offshore ocean troll catch and that fishing is beyond the control of the State or the commercial net fishermen. With respect to the ocean sport fishery, the district judge determined that a reduction in non-Indian fishing "would not to any applicable extent" make more fish available for harvest in the Case Area. *See* JA 432. The judge made a similar finding (JA 433) in ruling that inshore trolling (kelping) fishing within the three-mile limit does not affect a "significant number of fish" that would otherwise be available for harvest by the treaty Indians.

During 1978, the Indian purse seine catch of sockeye harvested during treaty-Indian-only fishing days was worth an average of no less than $70,561 for each Indian purse seiner. When his take during all-citizen fishery days is added, the average Indian purse seiner earned at least $99,337.[21] In addition to these profits during the IPSFC sockeye fishery, these same purse seiners predictably harvested substantial amounts of chinook, coho and chum salmon in these waters during non-IPSFC seasons.

By comparison, the average non-Indian purse seiner earned only $31,723, less than a third of what each Indian purse seiner earned.[22] Under these circumstances, the Court can well understand why the non-treaty fishermen are utterly baffled in their effort to see any equity in the bounty awarded to their Indian competitors in the form of highly profitable periods of exclusive fishing.

Moreover, even without this extra fishing time, the Indians still have an advantage. They need not obtain a fishing license and, therefore, there is no limitation on the number of Indians who can fish in these waters, as there is on the non-Indian fishermen who must comply with the Washington gear limitation law (RCW § 75.28.450 *et seq.*).

There is no question but that the Indian gear is quite competitive with the non-Indian gear and will increasingly

[21] R. Thompson, *Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission* (National Marine Fisheries Service, November 1978) (hereafter "*Thompson NMFS Summary*"), Table 3, p. 11. These calculations are based on an average weight of 6 lbs. per sockeye at the 1978 average price of $2.15 per pound.

Using these same calculations, the Indian purse seiners and gillnetters were able to harvest $1,587,268 worth of salmon on days when non-Indian fishermen were required to remain ashore by the district judge's order. *Id.*, Table 2, p. 9.

[22] *Id.*, Table 2, p. 9, and Table 3, p. 11.

enable the Indians to reap the full benefit of their court-awarded entitlement to at least 50% of the harvest. A government report on the 1977 sockeye and pink salmon fishery noted that, when comparing Indian landings on Indian-only days with landings on all-citizen days, "over 50% of Indian landings for both gillnets and purse seines occurred on all-citizens days when Indian fishermen were in competition with the all-citizen fishery."[23] As these facts demonstrate, to favor the Indians by exempting them from IPSFC regulations and awarding them half the harvestable catch—in the absence of any showing of discrimination—clearly conflicts with the teaching of the *Puyallup* trilogy and unfairly skews what ought to be a competitive commercial industry.[24]

Other available data also vividly illustrates the effects of the district judge's disproportionate allocation. The Indians

[23] U.S. National Marine Fisheries Service, *Preliminary Summary of the 1977 Sockeye and Pink Salmon Commercial Fisheries in U.S. Convention Waters*, p. 5 (1977). Compare the sworn statements of Randy Kinley, a Lummi Indian, that "I have a purse seine vessel and related equipment worth over $300,000," and that of Frank Marinkovich, a non-Indian purse seiner, that "an average [purse seine] fishermen . . . has approximately a $110,000 investment . . . ." Compare also the sworn statements of Hubert Markishtum, a Makah Indian gillnet and troll fisherman, that "I operate a fishing boat and related equipment worth $40,000," and that of Philip Sutherland, a non-Indian, that "an average gillnet fisherman has a vessel valued at approximately $22,500 . . . ." *See* Affidavits Marinkovich, Randy Kinley, Frank Marinkovich, Hubert Markishtum and Philip Sutherland filed in *Purse Seine Vessel Owners Association, et al.* v. *U.S. Department of State*, U.S. Dist. Ct., W.D. Wash., Cause No. C77-471.

[24] Both the government and the Indians in their briefs seek to create the illusion that this case involves a dispute between law-abiding Indian fishermen and lawless non-Indian fishermen. To the extent this issue is relevant, a clearer picture of compliance with the law is provided by the *Thompson NMFS Summary*, which reports that, during the 1978 sockeye season in United States waters under the jurisdiction of the IPSFC, Indians accounted for 15% of the fishermen but 33% of violations cited by federal enforcement agents. *See id.* at 15.

assert that the number of treaty fishermen has now risen to about 1200 (up from 794 at the time of trial, *see* JA 169). Ind. Br. at 59 n.209. At the same time, there were 3,612 non-treaty commercial fishermen who fished in Puget Sound. Even accepting the Indians' statistics, tribal fishermen constitute at most 25% of the commercial fishermen on Puget Sound.[25] Yet the treaty Indians were permitted to harvest 56% of the Puget Sound origin salmon commercially harvested in 1977. *See* JA 593-94. Thus, as one would suspect, the treaty Indian commercial fishermen are increasingly able to exploit the premium advantage they have received from the district judge throughout the case area.

B. If An Allocation Were Permissible, It Could Not Be Based On A 50-50 Split.

Properly understood and legitimately enforced, the Stevens treaties allow the courts only one practical solution to the current problem of scarcity. As the treaties are worded, each individual fisherman—treaty Indian and non-treaty fisherman—is subject to equal hazard and benefit, as against the forces of nature. The State's conservation regulations were promulgated to reduce the risks and increase the gains. In fact, the success of these regulations will determine whether the right to fish in common will remain a meaningful one for *all* the parties.

A modern accommodation of rights cannot be done at the expense of the explicit language of the treaties. The treaties

---

[25] R. Marasco & E. Anderson, *Washington Salmon Fisheries: An Economic Profile*, Table 7 (Washington Department of Fisheries, October 1977) (source: U.S. Department of Commerce, NOAA, National Marine Fisheries Service, *Fisheries Statistics of the United States*).

We are assuming for purposes of this discussion that the 1200 Indian fishermen are all fishing in the waters of Puget Sound in competition with petitioners, but in fact the Indians' own source material shows that this figure includes approximately 162 Indian fishermen from the Hoh, Quileute, and Qumault tribes who are not engaged in fishing in these waters. Thus, the disproportionate bounty awarded to Indians competing with petitioners is even more dramatic.

give all fishermen the right to compete for the resource—whatever it may be—equally. The district court's orders for the adoption of enforcement measures that allocate at least 50 percent of the fish to the Indians, in order to satisfy the Indians' desires, contradict the bare language of the treaties.

Any apportionment could be justified only on a finding that at a particular site the Indian fishermen had been discriminatorily denied equality of opportunity. *See Puyallup II, supra*, 414 U.S. at 48. In that event, the only fair allocation would be one based on the size of the groups of Indian and non-Indian fishermen competing for the fish at those sites, with the allocation proportioned to allow each fisherman an opportunity to harvest the same *per capita* share of the catch.

1. A 50-50 Split Is Inconsistent With The Creation Under The Treaties Of Individual Rights Of Equal Dignity, With Common Sense, And With The Understanding Of The Treaty Parties.

The Indians actually suggest that the Indians may have understood the treaties to give them half of the fish harvest. Ind. Br. at 133-35. The government understandably does not support this claim; it is as baseless as the Indians' other factual assertions. The government does, however, join them in contending that a 50-50 allocation will, minimally, fulfill the treaty Indians' needs.

As we have shown, the Stevens treaties recognize individual rights entitled to equal consideration in any regulation of a scarce resource. The 50-50 allocation adopted by the federal courts below is flatly inconsistent with this conclusion, since it obviously grants individual Indian fishermen considerably greater benefits than individual non-treaty fishermen. The context of the treaty negotiations also undermines the legitimacy of the 50-50 division.

Under the conditions prevailing at the time the treaties were negotiated, an allocation of 50 percent of the fish to the

treaty Indians and 50 percent to other fishermen would have been decidedly disadvantageous to the Indians. In 1854 there were approximately 7,600 Indians and 2,000 non-Indians in Western Washington. 384 F. Supp. at 352, JA 103 (FF 9). If the theory reflected in the district judge's orders had been applied when the treaties were negotiated and signed, the Indians, with a population four times greater than that of the non-Indians, would have received only half the harvest—or only one-fourth the volume allocated to the settlers when measured on a *per capita* basis. The Indians would hardly have been eager to agree to a mechanical 50-50 allocation under those circumstances, and there is no reason to believe the government's negotiators would have sought to impose such an allocation. Now that the population ratios have shifted, however, there is no defensible basis for attributing such an intent to the parties, simply because today it would confer a bounty on the Indians.

Indeed, the 50-50 allocation has always been logically unsound. As we pointed out in our opening brief (at 31-32), if only one treaty Indian remained interested in commercial fishing, it would entitle him to harvest as many fish as all of the State's other fishermen combined. It would also entitle members of a geographically favorably positioned tribe like the Makahs to join non-Indian fishermen in taking entire harvestable runs, to the complete exclusion of members of other tribes. Identical language in Article III of the Yakima treaty relating to use of public highways "in common," if construed identically, would allow the Yakimas to monopolize half the highways in the State. Neither the United States nor the Indians have even attempted a response to these logical absurdities of the position they espouse.

The Indians suggest to this Court that the tribal negotiators believed that "in common with" meant "one-half." The evidence to which they point, however, does not support that contention, since they construe quotes grossly out of context in an effort to manufacture helpful history. Apparently, several of

the negotiators did discuss splitting the Washington treaty lands in half, with the Indians to receive full rights to one half and none to the half to be ceded to the Territory. That approach, however, was *not* the one ultimately agreed on. Mr. Simmons, a Territory agent dealing directly with the Indians, explained to the Indians why that approach would be unsound:

> "[I]f they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That [in comparison] where a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites. If you can cultivate more land than this, you can have it." JA at 330.

Obviously, the Indians chose to keep a small tract of land as their "reservation" and to retain the freedom to enter "off-reservation" sites to fish. Thus, a provision sharing access to the resources was preferred over splitting the land resources in half. The Indians' present distortion of that incident simply illustrates the desparate flimsiness of their position. Moreover, the discussion of halving the land—a discussion that did not lead to agreement on that possibility—is *not* even paralleled by a discussion of dividing the fishery resource in half.

The Indians note that a word for "half" appears in Chinook jargon. But if that is so and if the parties did intend to split the catch in half, there is no plausible reason why these terms were not used in the treaties in place of "in common with." Understandably, the district court made no findings adopting the Indians' factual contentions here, and the United States now completely eschews them.

2. The Treaties Cannot Be Interpreted By Analogy To Agreements Between Two Foreign Governments.

The respondents ask the Court to uphold the 50-50 split by viewing the treaties between the Indians and the federal government like treaties between two separate and foreign nations, analogous to certain fishing treaties between the

United States and Great Britain. They also assert that the constructions that were given to treaties between those two countries should apply to the treaties between the Indian tribes and the United States. The argument is not only inapt, but disingenuous, for despite the implications carefully nurtured by the respondents, no international fishing treaty, including the ones they discuss, has been construed as even permitting a 50-50 allocation of the resource, much less as requiring such a division.

The analogy that respondents pose is inapposite for several reasons. First, the treaties were negotiated between the federal government and "numerous bands and fragments of tribes" that were organized by the federal authorities into political entities solely for the purpose of negotiating the treaties. 384 F. Supp. at 354-55, JA at 107-08 (FF 17-18). Governor Stevens actually decided how many tribes to construct and even selected chiefs and subchiefs with whom to bargain. *See* JA 42, 108. Thus, the actual history of the negotiations belies comparison with international compacts forged by two independent countries.

Second, the fiction recognized in international law that each nation is an equal sovereign does not generally carry over to Indian treaties and certainly would be fatuous if applied to the treaties before the Court. After all, Congress had already asserted American domestic jurisdiction over the Washington Territory, and the issues being negotiated involved the accommodation of the interests of people unquestionably subject to federal authority, American settlers and groups of Indians. It is naive formalism to suggest that each treaty between the United States and a specially organized tribe was intended to imply a 50-50 split of the fishery resource, regardless of the relative numbers of non-Indians and treaty Indians who, from time to time, might want to engage in commercial fishing. Indeed, Judge Boldt's own 1977 allocation to the Indians of from 37 to 48 percent of certain runs and this Court's affirmance in *Puyallup III* of a 45-percent apportionment for them preempt

the argument that a 50-50 split is a corollary of the supposed equality of the bargaining parties.

Two cases recently decided by this Court put into sharper focus the limited utility of talking about Indian tribes as "quasi-sovereign" nations. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), this Court decided that the Suquamish tribe—one of the parties to the present case—could not exert its criminal laws over non-Indian offenders residing on the reservation, despite the tribe's claim of quasi-sovereign status. This Court held that under the Treaty of Point Elliott, 12 Stat. 927 (1855)—also at issue here—the tribe acknowledged its dependence on the government of the United States, so that its powers are limited by the Constitution, congressional enactments, and other treaties. The Court concluded that the "exercise of jurisdiction over non-Indian citizens of the United States would belie the tribe's forfeiture of full sovereignty in return for the protection of the United States." 435 U.S. at 211.

In *United States* v. *Wheeler,* 46 U.S.L.W. 4243 (U.S. March 22, 1978) (No. 76-1629), the Court made clear that Indian tribal sovereignty is unique: "It exists only at the sufferance of Congress and is subject to *complete* defeasance." *Id.* at 4246 (emphasis added). The Court's discussion of the sharply limited scope of tribal sovereignty shows why the analogy to a foreign sovereign nation is a false one and why "quasi-sovereignty" does not support the implication of a right to control the off-reservation activities of non-Indian fishermen:

> *"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.* Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. . . . [T]hey cannot enter into direct commercial or governmental relations with foreign nations." *Id.* at 4246 (emphasis added; citations omitted).

Since the dispute now before the Court involves a clash between the rights of tribal members and non-Indian citizens, the Court cannot bow to assertions of tribal sovereignty. The concept of tribal sovereignty drops out of the picture once the interests of non-tribal members become involved.

Furthermore, any quasi-sovereign status enjoyed by the tribes does not extend to the members of the tribes. *See Puyallup III, supra.* The Indians before the Court are now United States citizens who enjoy the same rights and privileges as non-treaty fishermen. A federal equity court called upon to interpret and implement these treaties in the 1970's cannot blind itself to the fact that, at bottom, it is resolving a dispute between two groups of American citizens, not between two independent nations.

Finally, to the extent that the Stevens treaties were negotiated by the tribes and by the federal government as two separate sovereigns, the parties were negotiating as representatives *on behalf* of their respective citizens. As *Winans* holds (*see* pp. 20 n.13, 24 n.17, *supra*), rights accrue to those citizens, not simply to the entity. As we pointed out in our opening brief (at 36), the tribes do not even share in the proceeds from fish sales by their fishermen. Respondents choose to overlook this distinction between the mechanics of corporate negotiation and the individual enjoyment of the treaty rights, but that omission fatally infects their argument that a 50-50 apportionment is either required or justified by the quasi-sovereign status of the tribes.

3. Nineteenth Century International Fishing Treaties Were Not Implemented By A 50-50 Allocation.

The briefs of the government and the Indians would lead the Court to believe that the fishing treaties between the United States and Great Britain governing Newfoundland fisheries was understood by the American government as justifying a 50-50 apportionment of the fish and that an international tribunal had

so held. The briefs would also lead the Court to believe that the "in common with" language of these treaties was understood, too, to prevent excessive fishing by one party to the detriment of the other, rather than merely to guarantee equal access for all to the relevant fisheries. *See* Ind. Br. at 142-50; U.S. Br. at 67-69. Despite the respondents' artful discussions of these treaties, none of those inferences is true.

The respondents spend considerable time discussing the various interpretations of the phrase "in common with" in the treaties with Great Britain.[26] Yet the respondents' characterization that the United States interpreted these treaty rights as apportionable equal shares is disengenuous. The American position was concerned with assuring equal *access* by American fishermen and with preventing *discriminatory* regulation of them. There was never any contention that the common fisheries recognized by these treaties should be physically apportioned or that American fishermen could exclude their British counterparts in order to achieve a particular level of success in their ventures.

The Indians urge that, in negotiating the Treaty of 1818, both parties agreed "that the provision 'in common with' would prevent any practical crowding out of British fishermen by an excess of Americans, and would guarantee 'the equal measure and quality of right in the fisheries for which they were contending.' " Ind. Br. at 148. Thus, they argue, the Stevens treaties must effectively protect the relatively small number of treaty Indian fishermen from competition by a larger number of non-Indians. The historical premise is wrong, however, for the 1818 treaty was not viewed as a guarantee against vigorous competition, no matter how effective.

---

[26] Treaty of October 20, 1818, 8 Stat. 248; Treaty of June 5, 1854, 10 Stat. 1089; Treaty of May 8, 1871, 17 Stat. 863.

The "crowding out" of which Lord Bathurst complained had nothing to do with competition by the Americans, but concerned their actual exclusion of British subjects from the fisheries. Lord Bathurst expressly stated:

> "It was *not of fair competition* that His Majesty's Government had reason to complain, *but* of the preoccupation of British harbors and creeks, in North America, by the fishing vessels of the U.S., and the *forcible exclusion* of British vessels from places where the fishery might be most advantageously conducted." S. Doc. No. 870, 61st Cong., 2d Sess., Vol. 2, at 278 (1910) (emphasis added) (hereafter "S. Doc. No. 870").

Similarly, John Adams recognized, as the Indians note (Ind. Br. at 144), that American citizens were entitled to "full enjoyment of an equal share in this fishery." The Indians carefully end the quote there and imply that the words "equal share" were used to mean a 50-50 apportionment of the fishery between the two nations. That truncated quote, however, falsifies Adams' position. He immediately proceeded to point out that, because of the migratory nature of the fish, "it was necessary to have a nearly *general access* to every part of it." J. Adams, *The Fisheries and The Mississippi* 184 (1822) (emphasis added). *Equal access* was what Adams was concerned about.

Secretary Evarts' position was exactly the same. The Indians misleadingly quote Evarts to suggest that in his view the Treaty of 1871 precluded interference with "the enjoyment of either's share of the common fishery . . . ." Ind. Br. at 145. But he, too, recognized that American and British fishermen were to have unrestricted and undivided access to the fishery. His reference to interference with the enjoyment of fishing rights dealt only with dilution of the fishery by admitting

nationals of a *third* country.[27] Indeed, in a passage not quoted by the Indians, Evarts endorsed the view that under the treaty the Americans enjoyed "the freedom of the fishery [to use] the methods and occasions of our fishing enterprise and skill," even if that might "depreciate [the] benefit [of the fisheries] to the coast population, even beyond the treaty period . . . ." H. Ex. Do. No. 84 at 9. Evarts obviously contemplated full competition among the fishermen of both countries, with the only limitation being the exclusion of foreign fishermen from the common fishery.

The United States' position in the arbitration with Great Britain in 1909 also emphasized that the essence of the treaty right was equal individual access to the fishery. The Americans urged that the "liberty [to fish] was held *equally by the fishermen* of the two countries." S. Doc. No. 870, Vol. 8, at 36 (emphasis added). The Americans explained that this meant that the individual inhabitants of each country were free to fish, but not to exclude others from fishing:

> "[The treaty] implies a negation of exclusiveness, and hence, the words as heretofore stated, have no other meaning than that the liberty of fishing granted was one *to be held and enjoyed equally by the fish-*

---

[27] The full quotation, including the material deleted by the Indians, reads:

> "The test of the fishery articles of the Treaty of Washington shows that there was *no limitation whatever* upon the grant, *except* that the estate, right, and privilege granted were to endure but for a term of years, and were to be enjoyed by the United States *not exclusively, but in common* with Great Britain. There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the 'inhabitants or the United States' on the one side and 'Her Britannic Majesty's subjects' on the other, thus disabling either government from impairing the share of the other by introducing foreign fishermen into the common fishery. . . ." H. Ex. Doc. No. 84, 46 Cong., 2d Sess. 8 (1881) ("H. Ex. Doc. No. 84") (emphasis added).

ermen of the two countries, and therefore, necessarily, by neither to the exclusion of the other." S. Doc. No. 870, Vol. 8, at 38 (emphasis added).

The government's venture to guess that "an international tribunal would award half the fishery to each nation" in a dispute over common fishing rights is, indeed, a bold and misleading journey. U.S. Br. at 67-68. It is without a basis in fact. The treaties with Britain granted the liberty to fish "in common," but neither they nor any tribunal interpreting them contemplated any apportionment of the fish. An arbitral tribunal was convened in 1909 instead to resolve the reach of British regulatory power over United States citizens fishing in the common fisheries.

The Indians suggest (Ind. Br. at 149-50) that the United States then opposed all such power on Britain's behalf, since that assertedly would have rendered the Americans' rights "empty and valueless." The fact is that the United States agreed that Americans were subject to reasonable regulations by Britain, provided that the regulations were "appropriate and necessary for the protection and preservation of the common rights in such fisheries" as well as "fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class . . . ." S. Doc. No. 870, Vol. I, at 73-74. The United States asked only that its concurrence in the reasonableness of these regulations be required.[28] Far from objecting to British

[28] Despite the quotations seized on by the Indians from the American brief to the arbitral tribunal, the American position expressly disclaimed any contention "that American fishermen would have a greater liberty than that enjoyed by British fishermen . . . [or] that the subject-matter of the grant might be destroyed for want of regulations for its preservation if any should prove to be necessary." S. Doc. No. 870, Vol. 8, at 36.

Contrary to the implication of the Indians' selective quotations, the United States was arguing not that American fishermen were on any footing different from their British counterparts, but that the United States was entitled to participate with Britain in the formulation of whatever regulations might be necessary.

regulatory authority or demanding special privileges in the common fishery, the United States simply anticipated this Court's teachings in the *Puyallup* trilogy: the right to fish "in common" with others is no bar to the implementation of conservation regulations that preserve equal access to the fishery for all. That right of access does not imply a right to exclude others.

The decision of the arbitral tribunal reinforces this conclusion. The arbitration court specifically found that the words "in common with" confirm that United States inhabitants "were admitted to a regulated fishery." S. Doc. No. 870, Vol. I, at 78. These words "admit them only as members of a social community, subject to the ordinary duties binding upon citizens of that community, as to regulations made for the common benefit . . . ." *Id.* at 79. We argue for no more when we say that the Stevens treaties give treaty and non-treaty fishermen equal access to the Puget Sound fisheries, but give neither group a preference over the other.

In light of this record of interpretation, it is particularly ironic that the respondents point to the treaties with Great Britain, for, if relevant at all, they support our interpretation of the Stevens treaties, not theirs.

4. One-Sided Emphasis On The Indians' Alleged Needs Does Not Justify The 50-50 Apportionment.

Both the government and the Indians try to develop a third rationale for the apportionment decreed below, different from the grounds relied on by the district court and by the court of appeals. The district court viewed the language "in common with" as commanding a roughly equal apportionment as a matter of law. The court of appeals affirmed on the rationale that it was within the district judge's equitable discretion to apportion the fishery in the way a tenancy in common might be divided. The respondents now insist that the Indians' "needs" are a relevant benchmark and that, as a matter of fact, their needs now require at least 50 percent of the fishery. *See* U.S.

Br. at 69-72; Ind. Br. at 150ff. It is certain that the district judge did not follow that analysis, since he did not make any findings on what the Indians' "needs" are now, or on how to translate any alleged assurance of a particular standard of living as of 1855 into modern conditions.

The Indians and the government seek to rely on *Winters* v. *United States*, 207 U.S. 564 (1908), to support their contention that the Indians are entitled to as many fish as will serve their "needs." *See* Ind. Br. 76, 109, 122, 151ff; U.S. Br. 9, 56. The *Winters* case, however, involved water needed for the *personal use* of the tribe *on the reservation*. The water was not going to be used by the tribe for commercial purposes; that is, it was not going to be sold as fish are sold. Thus, it was practicable to decide what volume of water was needed for *personal* consumption on a *per capita* basis. Here, however, the Court is concerned with the proposed apportionment of fish to be taken off the reservation for commercial purposes. There is nothing in the text or history of the treaties to suggest that any subjective notion of commercial "needs" was to be superimposed on the Indians' right of equal access to their traditional fishing sites.

The respondents' standard of "needs" is not only boundless, but inherently discriminatory. Even assuming that "needs" could somehow be measured, nothing would prevent the respondents from returning to court in the future to complain that 50 percent no longer meets their needs.[29] But there is no reason to believe that each Indian fisherman's "needs" are greater on the average than those of the non-Indian fisherman. Just as the district judge concluded that the treaty right was to provide a volume of fish sufficient to the fair

[29] In *Arizona* v. *California*, 373 U.S. 546, 601 (1963), the Court "concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage," rather than population figures. But, unlike the number of irrigable acres on a reservation, the respondents' claim to satisfy their subsistence, ceremonial, *and* commercial "needs" has no limitation. Population figures here supply the "only feasible and fair" measure of *commercial* entitlement to fish, if an apportionment must be made.

needs of the Indians, the judge also concluded: "The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes." 384 F. Supp. 401, JA 195 (Conclusion 20). Thus, to the extent that "needs" are relevant today, they do not support the allocation of a disproportionately high share of the catch to the Indians.[30]

C. Modern Conditions Do Not Permit The Judiciary To Create A Preference For Indian Fishing.

The government argues that the 50-50 percentage allocation of rights is an "appropriate" solution to a problem not addressed by the treaties, in light of modern conditions. *See* U.S. Br. at 60. The recognition that the 50-50 split involves a basic policy or "legislative" decision, however, should be fatal to what the federal courts below have done. Moreover, modern conditions more convincingly negate the percentage allocation than favor it.

Respondents' over-zealous efforts to achieve a one-sided preference for Indian rights in order to adjust for unforeseen changes over the past century and a quarter have no legitimate foundation in the principles of fair interpretation of Indian treaties. This Court has held that when interpreting a treaty that grants bilateral interests, it will not "vary its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Northwestern Bands of Shoshone Indians* v.

[30] The respondents' "needs" analysis is based on cases that have no resemblance to the circumstances here. Of course, it may be appropriate to infer water rights on behalf of Indian reservations that could not otherwise sustain themselves. But that has nothing to do with the proper construction of treaties that expressly confer only rights to fish "in common" on the constituents of the treaty parties. The respondents' claim for a priority to satisfy their "needs" must be rejected, since it simply reads the "in common with" language out of the treaties.

United States, 324 U.S. 335, 353 (1945). *Cf. Oliphant* v. *Suquamish Indian Tribe, supra,* 435 U.S. at 197 n.8. Most recently, this Court has reminded us that the canons of construction for the interpretation of Indian treaties must be applied sensibly. *State of Washington* v. *Confederated Bands and Tribe of the Yakima Nation,* 47 U.S.L.W. 4111, 4115 n.22 (U.S. Jan. 16, 1979), No. 77-388.

Unlike the situation in *Winans* (*see* p. 20, *supra*), where the Court held that the parties had anticipated private ownership of the Indians' former fishing sites and had dealt with that condition, neither treaty party anticipated the events that have precipitated the decline in the productivity of Indian fishing here. No one foresaw that a resource as abundant as the salmon was at treaty times would ever become as relatively scarce as it is today.[31] Nor did anyone appreciate the degree to which economics would dictate the development of new marine fisheries in which fishermen can intercept some portion of fish that would otherwise pass the Indians' accustomed grounds. The treaty Indians were, of course, free to compete in those new fisheries on equal terms.[32]

The Stevens treaties guaranteed only an equality of access to these fishing sites; they did not promise that the Indians could maintain any particular level of productivity by the limitation of fishing by others, if necessary. The respondents' assertion that the treaty Indians have a priority right to fish

[31] This scarcity is not simply the product of increased fishing by non-Indians over the past 125 years, as the Indians imply. There has been a dramatic absolute decline in the fish harvested. For example, the average annual catch in the period 1911-1914 was 24,901,000 fish, but by 1971-1974 the catch had declined to 6,508,000. *See Amici* Br. of American Friends Service Committee, *et al.*, at 14-15.

[32] Contrary to the Indians' suggestion that these fisheries have only been exploited for the purpose of diminishing the Indians' catch, the fact is that species such as chum and pink salmon deteriorate rapidly on the way to their spawning grounds. As a result, it is more profitable to take these salmon before they migrate back up stream.

when the resource is scarce simply imputes to the treaties an intent that never existed. If the parties had had infinite prescience, perhaps they *might* have struck a different bargain. Yet, in light of concern by Governor Stevens and his colleagues that the Indians' treaty rights not interfere with the settlers' interests (*see* pp. 14-15, *supra*), it is highly doubtful that they would have conceded any priority for the Indians. In any event, it is not for the courts to rewrite history in order to confer greater treaty rights on one group of beneficiaries than any of the parties had any reason to consider and negotiate. Only the legislature—federal or state—has the power to alter and update the respective rights of the treaty parties to accommodate unforeseen circumstances.

As the district court's findings, supported by the evidence, indicate, the government negotiators believed that they were sufficiently accommodating the interests of all involved by stating simply that each person was to have the right to fish "in common" with every other person. That belief was communicated to the Indians. The only interpretation of the Stevens treaties that does not impermissibly alter their language is the one that takes the terms at face value and gives them a natural rather than a contrived meaning: the right to take fish "in common" gives each holder the right to fish together with his neighbor at the sites subject to this protection. This right cannot rationally be elevated into a right to exclude non-Indian fishermen from the opportunity to fish. The respondents' claims for "special" rights have no basis in law or fact that would permit their recognition by the courts.

This Court's decision in *Puyallup II* establishes that a federal court may consider some allocation only as a remedy for proven discrimination against Indian fishing at particular sites. Neither the district court nor the court of appeals purported to justify the "broad brush" 50-50 apportionment of the entire fishery on the basis of that principle, and there was surely no effort to tailor the decree to any peculiar problems at particular

sites.[33] In no event could a disportionate allocation to Indians be justified.

A federal court of equity attempting an implementation of these treaties today must be guided by several factors. First, little is accomplished by tying the allocation to the tribal character of the Indians, or to their dependence on fishing 125 years ago. The district court found that the Indians of Western Washington have, since treaty times, become increasingly assimilated into modern society:

> "Today most Indians wear traditional western clothing, speak English, utilize the western economic system and western technology, share western religious traditions and participate in the western sociopolitical organization. Traditional religious rights and ceremonies are no longer widely observed by most tribes. Modern Indians share similar goals with modern non-Indians to acquire most items of American material culture." 384 F. Supp. at 358, JA 114-15 (FF 33).

The district court also found that the treaties themselves were intended to "accomplish a transition of the Indians into western culture." *Id.* at 355, JA 109 (FF 21). The treaty Indian fishermen today no longer battle the elements to any greater extent that the non-treaty fishermen.

An equally important contemporary consideration is that the Indians are now citizens of the United States.[34] Thus, the recognition and enforcement of preferential commercial entitle-

[33] If the district court had found instances of discrimination, the only fair remedy would have been one that would ensure that treaty Indians had a practical opportunity to harvest a proportion of the available run that would be based on the number of Indian commercial fishermen when compared with the number of non-Indians. That would, on an average, respect the *per capita* equality of opportunity for all competing fishermen.

[34] 8 U.S.C. § 1401(a)(2) (1966), *amending* Citizenship Act of 1924.

ments for Indian citizens directly and substantially disadvantages the livelihoods of other American citizens whose involvement with the salmon fishing life is no less intense and compelling.

Additionally, subsequent to the negotiation of the Stevens treaties, the Fourteenth Amendment guaranteeing equal protection to all persons was added to our Constitution. A governmental decree requiring a 50-50 split between two groups of disproportionate size is unavoidably an unequal apportionment of the resource among the members of those groups. Yet it is our fundamental national policy to deal with individuals as such, and this Court has been loathe to allow group membership to submerge the individual's interest in personal justice. The Court should be equally skeptical here of the results reached by the courts below.

Thus, it is especially unwarranted for a court of equity today to superimpose on the Stevens treaties a judicial guarantee that treaty Indians may harvest more than their fair *per capita* share of the resource.

II. THIS COURT SHOULD NOT BE DIVERTED FROM SETTLING THE INTERPRETATION OF THE TREATIES.

In attempting to convince the Court to ignore the substantial and important questions raised by the non-treaty fishermen, the government (in a virtual repudiation of the position taken by the Solicitor General in his brief acquiescing in certiorari) and the Indians have presented a pastiche of confused and inconsistent jurisdictional and procedural arguments.[35] When

[35] In its brief acquiescing in certiorari, the United States urged the Court to reach and decide all the issues presented by the federal cases, expressly including the treaty interpretation questions. U.S. Br. on Pet. at 21-22. The government correctly observed that the Court's prior denial of certiorari did not operate as *res judicata* or "law of the case" with respect to any of the issues presented in that first petition. *Id.* at 22 n.17.

(footnote continued)

those arguments are examined, however, it becomes apparent that *res judicata* does not bar this Court from authoritatively construing the treaties, that the Court has jurisdiction over the cases coming here from the Washington Supreme Court, and that the Washington State courts properly entertained the claims of the non-treaty fishermen.

A. The Original Decision Of The District Court In This Case Cannot Be Accorded *Res Judicata* Effect.

In an effort to avoid the consequences of respondents' own default—their failure to join the non-treaty fishermen as parties under Rules 19(a) or 20(a) of the Federal Rules of Civil Procedure or to make the federal case a defendant class action under Rule 23(b)(1)—they now boldly seek to muzzle our

---

(footnote continued)

In its main brief, however, the government has reversed itself, and, while conceding that the doctrine of *res judicata* does not apply, now states that this Court should apply some other undefined doctrine of "finality" to leave in force the outstanding federal court interpretations of the treaties. No reason is given for this abrupt and highly inappropriate change in position, which clearly interferes with the proper exercise of this Court's discretionary jurisdiction, and which also serves to impede the formulation of clear and precise issues for decision by this Court.

The government's waffling on the State court cases is similarly puzzling. Its main brief now suggests, without even a pretense of legal argument, that the Court should summarily vacate the State supreme court's judgments because of the alleged impropriety of that court's acceptance of jurisdiction. Yet, in acquiescing in certiorari, the Solicitor General had advised this Court: "in all the circumstances, it is unprofitable to pursue the question whether the state courts should have declined the invitation to create a conflict of decisions." U.S. Br. on Pet. at 24.

In order to side-step the conflict between the State and federal decisions, the respondents would have this Court employ the expedient of summarily vacating the State court judgments without confronting the merits. Even if the Court could use such a device to eliminate the current conflict, however, the federal court decisions meet the other standards for review on the merits under Rule 19 of this Court's Rules.

arguments on the treaty questions. We trust, however, that the Court will hold that the non-treaty fishermen have a right to speak for themselves on the decision that imperils their livelihoods.

The government properly concedes that "the doctrine of *res judicata* is not strictly applicable" here (U.S. Br. at 48), but makes a "finality" argument that we deal with later (pp. 61-62). The Indians, however, spent considerable energy attempting to invoke that doctrine (Ind. Br. at 79-93), and to their points we now turn.

1. The District Court's Decision Was Non-Final And, Therefore, Not Entitled To *Res Judicata* Effect.

(a) The Indians concede, as they must, that *res judicata* "applies only to final judgments." Ind. Br. at 83. There are several reasons why the district court's decision was not final for *res judicata* purposes, chief among them being the court's failure to make the necessary certification required by Rule 54(b) of the Federal Rules of Civil Procedure for entry of a final judgment resolving less than all the claims in litigation. That Rule provides in pertinent part:

> "In the absence of such determination and direction, *any order or other form of decision, however designated,* which adjudiciates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action as to any of the claims or parties, and* the order or other form of decision *is subject to revision at any time* before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

The initial district court decision is clearly one to which Rule 54(b) was applicable because it adjudicated "fewer than all the claims" between the parties. Included among the complaints against the State in the original district court proceedings were claims for relief based on the State's alleged environmental degradation of the fishing resource. By special

order the district court segregated this and other issues for separate trial in what is now referred to as Phase II of this litigation. *See* 384 F. Supp. at 328, 411, JA 64, 214. Pretrial discovery on these claims has been proceeding and motions for summary judgment will be argued in April 1979. In still a later phase of this continuing litigation, the district court is to decide the treaty Indians' claims concerning entitlements to artificially propogated fish produced in State hatcheries. Those proceedings are presently scheduled to begin in June 1979. Indeed, the district judge himself repeatedly referred to his 1974 decree merely as "Final Decision *No. 1.*" (*E.g.*, JA 209 *et seq.*, 217 *et seq.*)

It is well settled that, absent a Rule 54(b) certificate, any decision or judgment falling within the ambit of Rule 54(b) remains interlocutory and does not finally terminate the action as to any of the claims or parties.[36] Rule 54(b) expressly so provides. The failure to certify the entry of a partial decision in accordance with Rule 54(b) means that, until all of the claims in the federal litigation are resolved, the 1974 decision remains interlocutory and provisional, and therefore cannot be accorded *res judicata* effect.[37]

---

[36] *See, e.g., Holton* v. *Crozer-Chester Medical Center,* 560 F.2d 575 (3d Cir. 1977); *Alley* v. *Dodge Hotel,* 551 F.2d 442, 444 n.6 (D.C. Cir.), *cert. denied,* 431 U.S. 958 (1977); *New York* v. *Nuclear Regulatory Commission,* 550 F.2d 745 (2d Cir. 1977); *Stevens* v. *Security Pacific National Bank,* 538 F.2d 1387 (9th Cir. 1976); 6 J. Moore, *Moore's Federal Practice* ¶ 54.42 (and cases cited therein); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2660 (West 1973).

[37] *See Republic of China* v. *American Express Co., Inc.,* 190 F.2d 334, 338 (2d Cir. 1951); 6 J. Moore, *Moore's Federal Practice, supra,* ¶ 54.42 at 812-13; 10 C. Wright and A. Miller, *supra,* § 2661 at 90. *See also Acha* v. *Beame,* 570 F.2d 57, 63 (2d Cir. 1978); *City of Parma* v. *Levi,* 536 F.2d 133 (6th Cir. 1976); *Virgin Islands* v. *2.6912 Acres of Land,* 396 F.2d 3 (3d Cir. 1968).

This is not to say that the district court's initial decision was not properly appealable to the court of appeals. That court had jurisdiction of the appeal pursuant to § 28 U.S.C. § 1292(a)(1), which

(footnote continued)

In *Republic of China* v. *American Express Co., Inc.,* 190 F.2d 334 (2d Cir. 1951), for example, the Second Circuit held that the dismissal of a counterclaim was non-final absent a Rule 54(b) certification. Under these circumstances, the court said, the decision was not entitled to *res judicata* effect, even in a parallel proceeding. *Id.* at 338. The court explained that by failing to make the express determination prescribed by Rule 54(b), a district court judge is deemed to have reserved "the power to alter" his decision, as though "by his explicit reservation, he left the order revocable, he kept it in suspense, and therefore truly interlocutory . . . ." *Id.* at 388.[38] Thus, the

---

(footnote continued)

provides for review of "[i]nterlocutory orders of the district courts . . . granting . . . injunctions . . . ."

Although the district judge stated that the initial 1974 decision was final and reviewable (JA 96), that assertion did not constitute an adequate "certification" for purposes of Rule 54(b). The district judge did not refer to the rule and did not make what Rule 54(b) explicitly and unambiguously requires: "an express determination that there is no just reason for delay." In making a determination that there is no just reason for delay, there must be some indication in the court's certification that all relevant factors were considered and that the rule's implicit presumption against finality was properly overcome.

Rule 54(b) certification must be reserved for the "infrequent harsh case." *Panichella* v. *Pennsylvania Railroad,* 252 F.2d 452, 455 (3d Cir. 1958); *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270 (2d Cir. 1968). *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2659 at 76-77 (West 1973). The district court must clearly "articulate the factors it relied upon in reaching the decision to grant certification." *Allis- Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360, 366 (3d Cir. 1975). *Accord, Gumer* v. *Shearson, Hammill & Co., Inc.,* 516 F.2d 283, 286 (2d Cir. 1974); *Schwartz* v. *Compagnie General Transatlantique, supra,* 405 F.2d at 275.

Judged against these standards, the district court's assertion of finality with respect to its 1974 decision is patently inadequate to certify that decision under Rule 54(b). Thus, the decision remained non-final for *res judicata* purposes.

[38] *Accord, Doctor* v. *Seaboard Coast Line R.R.* 540 F.2d 699 (4th Cir. 1976); *Bache & Co., Inc.* v. *Taylor,* 458 F.2d 395 (5th Cir. 1972); *United States* v. *North Carolina,* 425 F. Supp. 789 (E.D.N.C. 1977); *Oliver* v. *Monsanto Co.,* 56 F.R.D. 370 (S.D. Tex. 1972), *aff'd per curiam sub nom. Oliver* v. *Home Indemnity Co.,* 487 F.2d 514 (5th Cir. 1973).

district judge's initial decision in this case was not final for *res judicata* purposes either to bar litigation of the issues in the State court actions or to preclude reexamination of the initial rulings by the court of appeals—which did not invoke *res judicata*—or by this Court.

(b) Even apart from Rule 54(b), the district judge's 1974 initial decision is not entitled to *res judicata* effect under general principles of finality. That decision marked only a stage in these lengthy and complex proceedings.

The relevant case law compels the conclusion that the district judge's 1974 decree was in substance an interlocutory order. In *Catlin* v. *United States*, 324 U.S. 229 (1945), this Court stated: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 233. Similarly, in *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82 (1922), the Court held that a decree entering a permanent injunction and ordering an accounting was non-final because the accounting—"an inquiry not formal or ministerial, but judicial, in order to ascertain the amount of the damage to be awarded"—"was necessary to bring the suit to a conclusion upon the merits." *Id.* at 89.[39]

In the federal case now before the Court, the district judge has retained continuing jurisdiction over the cause to resolve a host of issues, including issues with a direct bearing on the issues addressed in the initial decision. *See* 384 F.Supp. at 388-89, 419, JA 171-72, 228-29. The ongoing nature of this litigation was also recognized by the court of appeals, which in

[39] *See also Marconi Wireless Telegraph Co.* v. *United* States, 320 U.S. 1, 47-48 (1943) (following *Simmons*); *George* v. *Victor Talking Machines Co.*, 293 U.S. 377 (1934) (per curiam) (decree "granting an injunction and appointing a special master to take . . . an account of profits . . . was interlocutory");*Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976); *Acha* v. *Beame*, 570 F.2d 57 (2d Cir. 1978); *Aetna Casualty & Surety Co.* v. *Giesow*, 412 F.2d 468 (2d Cir. 1969); *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir. 1944); *Restatement (Second), Judgments* § 41 Comment b at 3 (Tent. Draft No. 1, 1973).

the first appeal in 1975 affirmed the district court's initial decision but also remanded the case "so that [the district court] may maintain continuing jurisdiction." 520 F.2d at 693, JA 59.

Moreover, since the 1974 decision, the district judge has issued literally dozens of orders—some of which are at issue in this appeal—that have significantly modified and altered the first decision and injunctive decree. For instance, although the district court's initial decree sought only to assure an *opportunity* for the treaty Indians to take at least 50% of the harvestable fish (JA 88-89, 223), the court's 1977 decree and subsequent orders following this Court's denial of certiorari sought to *guarantee* to treaty Indians a disproportionately successful catch by banning fishing by non-treaty fishermen (*e.g.*, Pet. No. 78-119 at A. 89-90; Pet. No. 78-139 App. C).

In similar fashion the district judge has repeatedly revised the specific allocation of the harvestable fish. The original decree, as affirmed by the court of appeals, gave the treaty Indians a 50% allocation. *See* JA 50-51, 88-89. The 1977 decree and later orders provided for a different apportionment, varying from 37% to 48% on many runs, for an overall allocation of 45% of the harvestable fish. *See* Pet. No. 78-119, at A44 *et seq.* In still later orders on June 6, 1978, however, the court reverted—without explanation—to the original 50% allocation formula. *See* JA 482 (¶ 1).

Even more significant in this respect is the series of orders issued subsequent to the district court's 1974 decision and the initial appeal from that decision. In the intervening orders, the district judge has undertaken the direct management and control of the State's fisheries. In his initial decree, the judge had directed the State to issue revised regulations in accordance with his allocation formula, and also required prior court approval of new State regulations that would limit the harvest of fish by treaty Indians. *See* 384 F. Supp. at 415-17, JA 222-25. The regulatory scheme contemplated by the initial decree was clearly one of *State* management and enforcement, subject only to supervision by the district court.

In various orders beginning in August 1977, however, the State was ousted from virtually all responsibility for management of the fisheries, and the district judge, in turn, assumed control over all allocations. As described at length in petitioners' main brief, this assumption of control included, *inter alia*, the adoption by the district court of a plan for the management of the Puget Sound salmon resource, as well as various injunctive orders directed at petitioners, the non-treaty fishermen, prohibiting them from fishing in violation of the court's allocation scheme.

In view of such extensive revision and administration of its 1974 decree, the district judge's original decision can scarcely be termed final in any meaningful sense. As a non-final judgment, the 1974 decree was not entitled to *res judicata* effect either in this Court or in the State court proceedings.

2. The Parties To The Original District Court Decision Were Not The Same As The Parties In The Later Proceedings, And There Was No "Privity."

The district judge's 1974 decision is not *res judicata* for still another, independent reason: the parties in the federal litigation at the time of that decree were not the same as the parties presently before this Court in either the federal or the State cases. As the Court recently commented, *res judicata* only operates as a bar to relitigation of identical claims between *identical parties*. *Parklane Hosiery Co., Inc.* v. *Shore*, 47 U.S.L.W. 4079, 4080 n.5 (U.S. Jan. 9, 1979) (No. 77-1309). *See also Commissioner* v. *Sunnen*, 333 U.S. 591 (1948).

This salutory rule is constitutionally based. Due process forbids the binding of a person to a judgment in a prior litigation in which he was not a party, or in which he was not vicariously represented by an agent who assiduously and diligently represented interests that were precisely co-extensive with those of the non-party.[40]

---

[40] *See Parklane Hosiery Co., Inc.* v. *Shore, supra*, 47 U.S.L.W. at 4081 n.7; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *Chase National Bank* v. *Norwalk*, 291 U.S. 431 (1934).

For the reasons set forth at greater length in petitioners' main brief (at 57-64), the State of Washington was not an "adequate" representative of petitioners' interests for due process purposes. The mere fact that *some* of the positions asserted by the State were similar to those now advanced by the non-treaty fishermen hardly operates to bind them in interest with the State or otherwise to preclude their claims. The State was bound under State law to represent and accommodate the interests of *all citizens* of the State, including both the treaty and non-treaty fishermen, and, indeed, different groups of non-treaty fishermen. The petitioner Gillnetters and Purse Seiners are constitutionally entitled to represent their independent interest without the dilution that such multiple representation inevitably causes. Respondents' contrary claims in this regard are particularly ironic in light of their repeated attempts to tax us with the State's concessions or elections in the original federal proceedings that are obviously inconsistent with the interests of the non-treaty fishermen.[41]

The *parens patriae* decisions relied on by respondents and the court of appeals[42] are simply inapposite. The states in those cases were constitutionally adequate representatives because all their respective citizens had precisely the same interest as the State — the allocation to that State and its citizens, rather than to another State and its citizens, of a maximum share of a scarce resource. In the present case, however, the central issue is the allocation of a scarce resource among competing groups *within* a single State. The distinct status of the Gillnetters and the Purse Seiners is underscored by the district judge's decision to focus on these groups, rather than on other citizen fishermen like sports fishermen, when he extended his injunctive orders.

---

[41] *See* Ind. Br. at 94 (State position concerning apportionment), 248-49 (State handling of hatchery-fish issue); U.S. Br. at 65 n.32 (State position concerning *per capita* allocation), 75 (State position concerning on-reservation fishing and fishing for subsistence and ceremonial purposes).

[42] *E.g.*, *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932).

Under these circumstances the State of Washington could no more be the legally adequate representative of *all* its citizens than a class representative could adequately represent two distinct classes whose interests are in direct conflict with each other. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). This is especially true where, as here, the application of *res judicata* against the non-treaty fishermen would operate retroactively to reconstitute the federal litigation as a defendant class action— a procedural device that requires very careful application and administration even under ideal circumstances.[43]

For these reasons, the respondents' reliance on *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), proves unavailing. While it is true that the Court held there that the rights of various citizens had been settled in earlier litigation to which only the State had been a party, a special assistant attorney general had been specifically appointed in that case to represent the independent interests of the State's citizens. *See* 357 U.S. at 326. That procedure was not followed here, and thus the district judge's decree against the State cannot be treated as stripping the non-treaty fishermen of the right to be heard in an appropriate forum.

Nor is the requirement of legally adequate representation avoided by assertions that the non-treaty fishermen were in some formalistic sense "privies" of the State. As we explained

[43] In *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission*, Slip Op., No. 75-2059 (D.C. Cir., December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979), the court expressly rejected an attempt to analogize a prior suit against a government agency to a defendant class action:

> "Nor can the agency's role . . . be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. . . . [W]hen — as in the present circumstances—no class has been convened, no preclusive effect can possibly follow . . ." Slip Op. at 16.

in our opening brief (at 64-67), privity for purposes of binding non-parties is not a substitute for adequate representation.[44] On the contrary, privity *presupposes* constitutionally adequate representation. The essential inquiry in each case is *not* whether the party and non-party have *some kind* of legal relationship—like the relationship of a citizen to a State—but whether in the particular case the party and non-party are legally identified in interest.

As we have shown, there is a sufficient divergence in interests between the State and the Gillnetters and Purse Seiners—and other groups of Indian and non-Indian fishermen—to render the privity concept inapplicable. Therefore, the extension of *res judicata* effect to the district judge's 1974 decree in this case would deprive petitioners of their constitutionally protected right to a day in court, a right they were not given when the government and the Indians failed to join them as parties to the federal case.[45]

[44] Indeed, a relationship of privity connotes a nexus between the interests of the party and the non-party that is even closer than the constitutionally required minimum of adequate representation. Were the rule otherwise, the class action device would be rendered superfluous. Any vigorously defended ordinary civil suit would have the same preclusive effect as an action properly certified pursuant to Federal Rule 23.

[45] As illustrated by *Consumers Union*, there is no merit to the argument that petitioners must be bound by the initial district court decree in order to avoid the imposition of conflicting obligations on State agencies and officials. Federal Rules 19, 20, and 23 adequately provide for such contingencies. *See Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 120 (1968) (joinder intended to resolve the problem of conflicting exercise of equity jurisdiction); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

Respondents could have attempted to use those devices so as to structure the federal litigation to bring about a final and binding resolution of all issues in this case, uniformly determining the rights and responsibilities of all interested classes. They failed to use the devices open to them when they filed the federal case, and even after the district judge invited them to join all legally interested persons (JA 64). Respondents cannot now be heard to argue that their default should be remedied by the sacrifice of petitioners' right to a meaningful day in court.

Finally, as the District of Columbia Circuit recently held in *Consumers Unions of the United States, Inc.* v. *Consumer Product Safety Commission*, Slip Op., No. 75-2059 (D.C. Cir., decided December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979), the real party-in-interest who was not joined in a third party's suit against a government agency is not bound by the outcome of that suit and is free to pursue an independent action against the agency and to seek relief inconsistent with the earlier decision.[46] In this case, since the government and the Indians failed to join the non-treaty fishermen as parties in the original proceedings, as they could have done under Rules 19(a) and 20(a) of the Federal Rules of Civil Procedure, the 1974 federal decree against the State may not lawfully bar us from asserting our independent legal rights in state courts of competent jurisdiction.

3. This Court's Prior Denial Of Certiorari Did Not Render The District Court's 1974 Decision *Res Judicata*.

The fact that this Court once before denied certiorari in a prior phase of the federal litigation in this case has no significance with respect to the availability or scope of review

[46] In *Consumers Union* the court of appeals rejected the argument that a judgment in a reverse Freedom of Information Act suit against a federal agency, prohibiting it from disclosing certain material, should be treated as binding on a different plaintiff seeking disclosure of the material in a later FOIA action against the same agency. The position asserted unsuccessfully by the agency in the first action was the same as the position asserted by the plaintiff in the second action. The court explained that:

> "to accept a government agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent." *Id.*, Slip Op. at 15 n.42.

The court also commented:

> "An agency's interest in FOIA suits . . . diverge markedly from private interests and raise serious doubt whether the agency could ever be decreed to represent members of the public." *Id.*, Slip Op. at 15.

now. This Court has on numerous occasions granted certiorari and decided issues that had been the subject of an earlier decision in the same litigation that the Court had declined to review.[47] In none of these cases did the prior refusal of review operate as *res judicata*.

In declining to review a decision in an on-going litigation involving important questions of federal law, this Court does not forever cut off its appellate jurisdiction to decide federal questions presented at a later stage of the proceedings. Where, as in this case, the operative judgment of the lower court is an injunction over which the trial court retains continuing supervision, this Court must have the power to undertake plenary review of the federal issues whenever it concludes that the standards of Rule 19 are met.

The denial of a petition to review even a final judgment operates as *res judicata* in one respect only: it bars relitigation of the same claims between the *same parties* in *separate lawsuits*. This is a straight-forward and routine application of traditional *res judicata* doctrine, and the cases cited by the Indians stand for no more than this basic proposition. *See, e.g., Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). Since, as contemplated all along, proceedings have taken place in the federal case after the initial denial of certiorari, *res judicata* does not bar this Court from reviewing the underlying issues in that case now.

B. The State Supreme Court Properly Reached The Merits Of Petitioners' Claims And Its Decision Is Properly Before This Court For Review.

Throughout their briefs, the government and the Indians repeatedly accuse the Washington Supreme Court of bad faith, of encouraging illegal conduct, and of engaging in subterfuge.

[47] *See, e.g., Piper* v. *Chris Craft Industries, Inc.*, 430 U.S. 1 (1977); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers Co.*, 240 U.S. 251, 257-58 (1915); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964).

See, e.g., U.S. Br. at 52-53; Ind. Br. at 200-02, 205. These charges should be repudiated as unwarranted and unseemly. That court was called upon to adjudicate the claims of the non-treaty fishermen against the State, including issues of State law. There was clearly jurisdiction over the controversy. The fact that the government and the Indians disagree with the opinion of the majority of that court, and are unhappy that the court declined to defer to a federal court's decision to which it was under no duty of deference, does not provide any support for an *ad hominem* attack. The Justices of the Washington Supreme Court acted professionally, in accordance with their understanding of the law and in the legitimate exercise of their judicial function.

1. The State Cases Present Justiciable Controversies.

(a) In their briefs on the merits, the government and the Indians have suggested for the first time that the State cases do not present a "case or controversy" within the meaning of Article III, and that such a determination "would justify vacating the resulting judgments without reaching the merits." U.S. Br. at 51; *see* Ind. Br. at 254.

It is especially dismaying to see the Solicitor General subscribe to a contention that so clearly misperceives not only Article III, but also the jurisdictional consequences of his own argument. If the State cases did not constitute "cases or controversies" within the meaning of Article III, the result urged by the Solicitor General—overturning the State judgments—would not follow. Rather, this Court would lack jurisdiction to review them. This Court would then lack any power whatsoever to disturb the State Supreme Court's judgments, or to issue any order other than a dismissal of the writ of certiorari for lack of jurisdiction. The State supreme court judgments would stand as they have been entered, and would remain in full force and effect. *See Tileston* v. *Ullman*, 318 U.S. 44 (1943).

No doctrine of federal law prohibits a State court from deciding a dispute that might not satisfy the requirements of Article III, even if the parties are tendering federal questions for

resolution.[48] Any holdings of a State court in a federally non-justiciable matter—including rulings on matters of federal law—must be left undisturbed by this Court. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 57.12, at 57-110 n.7 (2d ed. 1974); Frankfurter, *Note On Advisory Opinions*, 37 Harv.L.Rev. 1002 (1924). Since the respondents have not even bothered to suggest any legal basis for their contrary assertion, the Court should reject it summarily.

(b) In fact, this Court does have constitutional authority to review the State cases, since the parties to those cases were sufficiently adverse to pose a "case or controversy" for Article III purposes.

Neither the State nor the non-treaty fishermen are "actually and formally in control of the other party," as in *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892). Neither party is in control of and financing both sides of the litigation, as in *United States* v. *Johnson*, 319 U.S. 302 (1943). Nor does this case involve a situation where parties are purposefully cooperating in order to injure the rights of rival claimants by litigating without the knowledge of the third parties, as in *Lord* v. *Veazie*, 49 U.S. (8 How.) 251 (1850).

Nonetheless, the Indians claim that adversity is lacking because the non-treaty fishermen and the State are "identified in legal interest" and "desire the same result."[49] In asserting

---

[48] *See DeFunis* v. *Odegaard*, 84 Wash. 2d 617, 529 P.2d 438, *on remand from* 416 U.S. 312 (1974) (Washington courts not bound by requirements of Article III).

[49] The Indians erroneously equate the views of State officials with the official posture of the State. Even though various State officials agreed with the non-treaty fishermen that the federal court had erred in its interpretation of the treaties, the State was under order to enforce the federal decree. Accordingly, the State interposed the federal decree in defending against the actions filed by the non-treaty fishermen. In addition, the State also disputed our claim that State law marked the outer limit of the enforcement powers of State officials. *See Nozewski Polish Style Meat Products* v. *Meskill*, 376 F.Supp. 610 (D. Conn. 1974).

that we are identified in legal interest with the State, the respondents are again trotting out their formalistic arguments about "privity." As we have demonstrated at length in our main brief (*see* pp. 55-73), however, and as we reiterate in this brief (*see* pp. 54-58), non-treaty fishermen are not in privity—or "identified in legal interest"—with the State. In fact, the fishermen's interests diverge substantially from the State's.

In addition, in arguing that we are not adverse to the State because we "desire the same result," the respondents have fallen victim to the imprecision that so often confounds litigants who interpose arguments of non-justiciability. As Professor Wright has noted, "[t]he rule against collusive litigation does not mean—though it is sometimes stated as if it is meant— that the parties must actually disagree." C. Wright, *The Law of Federal Courts* § 12, at 40 (West 2d ed. 1970). If parties actually have different interests and one is seeking judicial relief against the other, there is sufficient adversity to support federal jurisdiction. *See* 13 C. Wright & A. Miller, *Federal Practice and Procedure* § 3530, at 167 (West 1975).

Thus, a federal court has the power to enter judgment on the consent of the parties, *see Swift & Co.* v. *United States*, 276 U.S. 311 (1928), or to render a decree despite a defendant's failure to challenge a plaintiff's claim, *see Sharon* v. *Tucker*, 144 U.S. 533 (1892). As long as there are two independent parties to a litigation, there is sufficient adversity if one party seeks a decree that would bind the other to a course of conduct different from the conduct being challenged, but the defendant is unwilling or unable to act in the absence of a decree.[50]

---

[50] *See Kentucky* v. *Indiana*, 281 U.S. 163 (1930); *Consumers Union of the United States* v. *Consumer Product Safety Commission*, 561 F.2d 349 (D.C. Cir. 1977), *vacated and remanded for further consideration*, 434 U.S. 1030 (1978), *on remand*, Slip Op., No. 75-2059 (D.C. Cir., December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979). *See also Granville-Smith* v. *Granville-Smith*, 349 U.S. 1 (1955); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210 n.9 (1968).

For example, in a case that is materially indistinguishable from this one, *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), Indiana declined to perform on a contract with Kentucky. Even though Indiana agreed that the contract was valid, it refused to perform because the contract was being challenged by Indiana citizens in the Indiana courts. This Court held that there was a "case or controversy" between those states even though the parties "desired the same result" and were in exact agreement on the law and the facts. There was sufficient adversity because, in the absence of an order from this Court, the "State of Indiana, while desiring to perform its contract, is not going on with performance because of a suit brought by citizens in its own court." *Id.* at 173.

The *Consumers Union* case recently decided by the District of Columbia Circuit is similar to *Kentucky* v. *Indiana*, and is also virtually on all fours with this case in establishing federal jurisdiction over the suits between the State of Washington and the non-treaty fishermen. The plaintiffs in *Consumers Union* had filed a Freedom of Information Act request with the Consumer Product Safety Commission. When the Commission ultimately decided that it would disclose the requested information, various manufacturers sought and obtained a preliminary injunction against disclosure, over the Commission's opposition, in a "reverse FOIA suit." While that case was pending the group seeking the information filed an FOIA suit against the Commission in a different court. The district court dismissed for lack of justiciability, since the Commission also agreed that the information should be disclosed. Therefore, the district court observed, the plaintiffs "[stood] in the same position on the crucial issue in the case" as the defendant Commission. 400 F.Supp. 848, 851 (D.D.C. 1975). The court of appeals, however, reversed, holding that the case was, indeed, justiciable. The court explained that "although the Commission would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so." 561 F.2d at 354. *See also* Slip Op., *supra*, at 12.

Under the principles recognized by these cases, this Court has before it a justiciable controversy within the meaning of Article III. At the time the State cases were being litigated in the State courts, and even now, the State of Washington was subject to federal court decrees compelling it to act against the non-treaty fishermen in a manner that the fishermen claim is illegal. These fishermen sought in the State courts, and seek now, to bind the State to a different course of conduct. Indeed, the government itself emphasizes that the State Department of Fisheries was enforcing the district judge's orders against the non-treaty fishermen *until* the State supreme court ruled that conduct illegal. U.S. Br. at 24. Even if certain Washington officials personally desire the same ultimate result in this case as the non-treaty fishermen, those officials were and are unable to achieve that result because of orders issued by a federal court. Sufficient adversity thus exists in the State court cases between the non-treaty fishermen, who seek a particular result, and the State, which is otherwise unable to achieve that result.[51]

(c) Finally, we find it ironic indeed that the government and the Indians are complaining about the vigor with which the

[51] The two-paragraph per curiam opinion in *Moore* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 47 (1971), on which respondents rely, does not undercut these principles. In *Moore* both the plaintiffs and the defendant affirmatively argued the same position — that North Carolina's anti-busing statute was constitutional. That is quite a different situation from this case, where the State actually presented arguments contrary to those of the non-treaty fishermen, and where unarguably adverse parties — the United States and the fishermen — reenforced those contrary arguments as *amici curiae*.

Moreover, the plaintiffs in *Moore* did not seek to enjoin the defendant or bind it to any position or course of conduct different from the position it was then taking. The plaintiffs merely sought a declaratory judgment that a state statute was constitutional; so did the defendant charged with enforcing it and willing to enforce it. A clearer case of a request for an advisory opinion is hard to imagine. Thus, when the Court considers the facts of *Moore* — as opposed to a single phrase taken out of context by respondents — it becomes clear that *Moore* bears little resemblence to the State cases now before the Court.

State argued its case in the State courts. The respondents argue that *amicus* status is sufficient for petitioner non-treaty fishermen to be bound by the federal decree but carefully ignore their own active participation as *amici* in *Gillnetters* and their deliberate refusal to accept the invitation to participate in *Passenger Vessel*. They had full opportunity to present their arguments as vigorously as possible, and did so. Even "[c]ases conceived in cooperation [which this case surely was not] . . . may be saved by the intervention of a genuine adversary . . . ." *Associated General Contractors of America, Inc.* v. *Laborers' International Union*, 476 F.2d 1388, 1403 (Temp. Emer. Ct. App. 1973).

The actual participation in the State courts by the government and the Indians—parties undeniably adverse to the non-treaty fishermen—renders academic any arguments about the adversity of the State and the non-treaty fishermen. Both the State and the *amici* placed before the State courts the federal judge's evidentiary findings and legal conclusions. In this setting, it is preposterous to suggest that the State courts were being lulled into deciding federal issues blindly, without a vigorous adversary presentation.

2. The Absence Of The United States And The Indians From The State Cases Did Not Bar The State Courts From Adjudicating The Commercial Fishermen's Claims.

In an astonishing display of irony, the respondents—who lightly dismiss the non-treaty fishermen's arguments that they were prejudiced by their exclusion from the federal case—cry in outrage that they were not present in the State court cases and insist that the State courts were unable to proceed without them. The argument is worthless.

In the State supreme court, the respondents, as *amici curiae*, asserted that they could not be joined due to their

sovereign immunity. Ind. Br. at 217.[52] They were invited to intervene under Washington Rule of Civil Procedure 24, but declined to do so. Consequently, it does not now lie in their mouths to claim that the State court should not have proceeded without them.

In any case, the alleged indispensability of parties in State court, and the power of a State court to proceed without a party, are matters of State law and are not cognizable by this Court. Even if the government or the Indians had been "indispensable" in State court under State law, that fact would be irrelevant now. The relief requested—a holding that the State courts should have dismissed these actions, *see* Ind. Br. at 219—is simply beyond this Court's power to award.[53]

Moreover, even analogizing to the standards of Rule 19 of the Federal Rules of Civil Procedure, the State courts would not have been required to dismiss the non-treaty fishermen's complaint. Rule 19 expressly recognizes that it may be impossible to join an otherwise "indispensable" party because of some jurisdictional impediment, and the Rule quite sensibly declines to command dismissal of the action. Instead, under Rule 19(b) the court must undertake a flexible and pragmatic analysis of whether the action should proceed without the presence of the person who cannot be joined. *See Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1607 (West 1972).

---

[52] In light of this fact, the United States' assertion that there was no "attempted joinder," *see* U.S. Br. at 51, is purely tendentious. Indeed, the statement is inconsistent with the prior sentence that "each of the Tribes, as well as the United States, enjoyed sovereign immunity."

[53] The Indians cite no authority supporting the relevance of this State law argument in this Court. The cases cited by the United States, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940), and *Minnesota* v. *United States*, 305 U.S. 382, 386-89 (1939), deal only with the existence of sovereign immunity.

In this case, even if we assume that the government and the Indians should have been joined if feasible—as the State attempted to do—the State courts had the power to decide that the actions could fairly proceed in their absence. The "indispensable party" objection, therefore, like all of the respondents' other procedural straw men, furnishes no ground for upsetting the State court judgments.[54]

In sum, the Washington State courts acted legitimately in deciding the merits of our claims, and the State cases are properly here for review on the merits.

C. The State Courts Were Not Obligated To Defer To The Lower Federal Courts As A Matter Of Comity Or Under The Supremacy Clause.

While conceding that the "doctrine of *res judicata* is not strictly applicable" to this case (U.S. Br. at 48), the government

---

[54] The Indians also assert that the adjudication of the State cases without their presence as parties violated their federal due process rights. The Indians, however, invoked sovereign immunity to prevent their joinder, but nevertheless participated as *amici curiae*. They had ample opportunity to be heard, an opportunity that was offered to them with as much insistence as the law allowed.

The posture of the Indians in the State court cases is dramatically different from the status of the non-treaty fishermen in the federal case. The Indians stood behind sovereign immunity to frustrate repeated efforts to join them in the State cases. By contrast, they had made no effort to join the non-treaty fishermen in the federal case, and when some fishermen sought permission to intervene in that case, they were rebuffed by the district judge.

In addition, the Indians' contrivance about a due process issue is of scant relevance at this stage. The proper time for them to complain about the State judgments would come if at some point in the future someone claims that the judgments operate as *res judicata* against them. Indeed, that is the irrelevant thrust of the cases they cite in support of their due process argument. *See Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

Shields v. *Barrow*, 58 U.S. (17 How.) 130 (1855), also cited by the Indians, is an early expression of the federal law of indispensable parties, and has no direct bearing on the issues in this case.

propounds a different basis for its challenge to the decision of the State courts to hear the claims of the non-treaty fishermen: "judicial comity." The Indians frame a similar argument in Supremacy Clause terms. Both theories dissolve upon analysis.

1. No Principle Of Comity Applied.

(a) The "comity" argument is fundamentally flawed in that it misunderstands basic principles of federalism. While the federal courts are courts of limited jurisdiction and, as a constitutional matter, must defer to State courts in deciding questions of State law, *see Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the converse is not true. State courts are courts of general jurisdiction, and their power to decide federal questions is coordinate with that of the federal courts.[55] Thus, a State court is under no duty to defer to the decisions of federal district courts or courts of appeals in deciding questions of federal law. *Cf. Consumers Union of the United States* v. *Consumer Product Safety Commission, supra*, Slip Op. at 13 n.36.

There is simply no doctrine of federal law that *obligates* a State court to refrain from deciding a case involving federal questions that are also being adjudicated by a federal court, even if the claims or issues in both courts are similar or identical. The coordinate autonomy of the State courts is especially appropriate where, as here, the federal decision is not yet final (*see* pp. 49-54, *supra*) and important questions of State law are inextricably intertwined in the case. Not surprisingly, therefore, the government is unable to cite anything in support of its peculiar notion of "comity."

The "abstention" doctrine—by which federal courts may defer to State courts in cases that involve unsettled questions of state law, *see Railroad Commission of Texas* v. *Pullman Co.*,

[55] *See Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 502 (1962); *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts And The Federal System* 359-60, 418-30 (2d ed. 1973) (hereafter "*Hart & Wechsler*").

312 U.S. 496 (1941), or might create a conflict with a State's administration of its own affairs, *see Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943)—provides an instructive comparison. This form of "comity" is animated by our federalism: the federal judiciary ought not encroach upon areas of State law that are the *exclusive* province of the State courts to define.

The reverse, however, is not so: the State courts have concurrent jurisdiction to participate in the definition of federal law. Under the constitutional plan of the Framers, the very decision whether to create inferior federal courts was left open for resolution by Congress. *See Hart & Wechsler* at 11-12. When Congress decided to establish lower federal courts, it entrusted them with quite limited jurisdiction, principally diversity jurisdiction. As explained by *Hart & Wechsler* (at 844):

> "[T]he principle established by the first Judiciary Act was that private litigants must look to the State tribunals in the first instance for vindication of federal claims subject to limited review by the United States Supreme Court."

Indeed, the State courts had virtually the entire responsibility for developing federal law (subject to this Court's review) prior to the creation of general (but not all-embracing) "federal question" jurisdiction in 1875. *See* Judiciary Act of 1875, § 1, 18 Stat. 470. Properly understood, therefore, nothing in our federal system implies that a State court has a duty to defer to a lower federal court on federal questions.[56]

[56] Moreover, even under the "abstention" doctrine, a federal court has discretion whether to stay or dismiss an action. *See Railroad Commission of Texas* v. *Pullman Co., supra*. Thus, even if the "reverse-abstention" asserted by the respondents were the law, the State court would not be *required* to stay or dismiss the proceedings before it, but would merely be *permitted* to do so. In this case, the State courts, although expressly aware of the federal proceedings and the "comity" arguments against adjudication of the fishermen's claims (*see* the dissents in the Washington Supreme Court cases), decided that it was appropriate to proceed.

(b) Moreover, respondents misperceive the nature of judicial "comity." As the Court of Appeals for the District of Columbia Circuit has recently noted, the doctrine of "comity" "surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent." *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 17 (footnote omitted). The decisions invoking "comity" involve circumstances in which the plaintiff in the later suit was a *party* to the earlier action involving the same issues and subject matter. *See id.,* at 17 & n.46. *See also, e.g., Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

The plaintiffs in the State cases—the non-treaty fishermen—were *not* parties to the federal court proceedings, and the district judge expressly so recognized, JA 431. Accordingly, the principle of comity cannot be applied, for to do so would be to deprive them of their day in court. "Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by . . . the Constitution, to have their claims adjudicated." *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 18-19 (footnote omitted). This Court has stated again and again that "no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."[57] This basic tenet of due process can hardly be circumvented by the government's "ritualistic invocation of 'comity.'" *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip. Op. at 23.

Indeed, by claiming that the State courts should have dismissed the non-treaty fishermen's claims on grounds of "comity," the respondents are seeking to penalize the fishermen for the respondents' own tactical errors. As we have shown above (at 48-49, 57 n.45), Rules 19, 20, and 23 of the Federal

[57] *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* 390 U.S. at 122, *quoting Mallow* v. *Hinde,* 25 U.S. (12 Wheat.) 193, 198 (1827).

Rules of Civil Procedure provided a panoply of devices whereby the government and the Indians might have brought the commercial fishermen into the federal suit. Indeed, when some of the fishermen sought to intervene, their petition was successfully opposed. Having eschewed all these mechanisms, the respondents cannot now bemoan the threat of inconsistent adjudications, "since they never attempted to foreclose that possibility by seeking the joinder of" the non-treaty fishermen in the federal case. *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 24. *See also Boles* v. *Greeneville Housing Authority,* 468 F.2d 476, 479 (6th Cir. 1972).

2. The State Court Judgments Are Not "Void Under The Supremacy Clause".

The Indians argue that the judgments of the State court are "void under the Supremacy Clause," since State officers are "obligated to honor and protect federal rights" and since there had been "a federal court decision which had already held that the state action would lead to a denial of a federal right." Ind. Br. at 207-08. Both of these assertions beg the question, in that they assume that federal law is what respondents want it to be.

It is certainly true that, under the Supremacy Clause, State officials, including State courts, must abide by federal law. But it is equally true that the decision of a lower federal court does not definitively declare the supreme law of the land. Under the constitutional plan, state courts have autonomy to decide what federal law is unless and until this Court speaks.

While there is no doubt that State judges are bound by treaties entered into by the United States, a State court may come to its own independent conclusion about the meaning, validity and effect of the treaty in a given case, if this Court has not settled the matter. The State court may be incorrect, and if so, it is subject to reversal for that reason by this Court. But the contention that a State court judgment is "void under the

Supremacy Clause" because it disagrees with an opinion of an inferior federal court has no foundation in the Constitution.[58]

D. The Holding Of The State Supreme Court As To The Power Of State Officials Must Be Accepted By This Court.

1. The Holding Is A Matter Of State Law.

The Washington Supreme Court has held, in a definitive interpretation of several State statutes, that the officials of the Washington Department of Fisheries are only authorized to regulate the State's fisheries for conservation purposes, and are *not* empowered to allocate fish among fishermen for any other purpose.[59] This definition of the scope of official powers of State

[58] Similarly, the Indians' argument that the State supreme court's holding "operates" to "obstruct the implementation" of the federal district court's remedies, Ind. Br. at 212, has nothing to do with the Supremacy Clause. The argument is nothing more than a restatement of the *res judicata* arguments that are repeated throughout their brief.

The Indians emphasize the statement in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), that "once a district court's order becomes *final*," the State officials who are parties to the federal proceedings are bound by it. Ind. Br. at 212-13. This statement clearly refers, of course, to the *res judicata* effect of the district court judgment on parties, not to any broader effect on non-parties flowing independently from the Supremacy Clause.

The other cases cited by the Indians in the "Supremacy Clause section" of their brief, Ind. Br. at 207-13, are not germane either. Both *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), and *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971), simply involved review of federal district court proceedings in which State statutes were declared unconstitutional.

Testa v. *Katt*, 330 U.S. 386 (1947), also cited by the Indians, is equally inapposite here. *Testa* holds simply that a State, having made a particular type of remedy available in its courts for violations of State law, could not refuse to grant that remedy for violations of federal law.

[59] *See Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P.2d 1151, 1153-54, 1159 (1977); *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash. 2d 276, 279, 571 P.2d 1373 (1977).

officials is the law of the State of Washington, and this Court must accept it as such. That aspect of the State court's decision, therefore, is not subject to reversal by this Court, unless the State statutes themselves, as thus interpreted, are in violation of federal law. The respondents have not even attempted to make that argument.

The Indians, however, engage in a confusing exercise in which they attempt to argue that these holdings are really matters of *federal* law. Ind. Br. at 203-06. The State court, however, relied on State statutes in holding that the Department of Fisheries has no statutory authority to issue regulations designed to allocate fish to users on any basis other than one related to *conservation*. The Department of Fisheries may allocate the salmon harvest between sport fishermen and commercial fishermen, for example, or among various types of fishing gear, because such allocations are directly related to *conservation*.[60] The Department is not, however, empowered to allocate the fish within a "user class," and may not, for example, make any distinctions among hook and line sport fishermen fishing a particular run, or among gillnet commercial fishermen fishing a particular run. Under these principles the State court ruled that its officials may not treat Indian and non-Indian fishermen differently, except to the extent that they fall into different "user classes."

When the holdings of the State supreme court are examined, it becomes absolutely clear that *State* law issues were being decided. The fact that those decisions may have affected the manner in which a federal district court is able to frame a decree does not change the basic State law nature of those holdings as determinations of State law or subject them to reversal by this Court.

[60] An allocation of the salmon harvest among various types of fishing gear is clearly related to conservation. Thus, Wash. Rev. Code § 75.12.010, cited by Indians at n.435 of their brief, is perfectly consistent with the statutory scheme as explicated by the Washington Supreme Court.

2. A Federal District Court May Not Mandate That State Officials Act Affirmatively In Excess Of Their Authority Under State Law.

(a) As we demonstrated in our main brief, the district judge acted improperly in ordering State officials to act affirmatively in excess of the authority granted them by State law. In our view, the treaties do not constitute an independent basis for charging State officials with the responsibility for enforcing apportionments that a federal district court believes are appropriate under treaties between the United States and the Indians. If there is a federal right to apportionment, it is up to Congress to furnish the resources to administer it. The treaties do not permit the district judge to dragoon otherwise unauthorized State officials into a federal posse, as he has attempted to do.[61]

We agree with the United States, of course, that State officials may be prohibited from *interfering* with the operation of a federal treaty. *See* U.S. Br. at 78-79. It is quite a leap, however, from that obvious proposition to the proposition that State officials are *required* to become the administrative arm for *enforcing* a federal treaty, regardless of the limits on their authority under State law. That is a leap this Court should not make, for to do so would be to ignore the serious federalism questions raised in our main brief.

---

[61] The government has implied that the non-treaty fishermen disagree with the State's acknowledgement that the State courts will accede to this Court's interpretation of the treaties on the enforcement responsibilities of State officials. U.S. Br. at 78. This is a blatant misquotation.

In our main brief at 54 n.44, we stated our disagreement with the State attorney general's position that this is properly an issue of federal rather than State law. We argued only that the position of the state Executive on the question of the Department of Fisheries' authority could not control over State legislative judgments and judicial interpretations. We certainly do not take issue with the proposition that, if this Court concludes that the federal treaties validly impose additional powers and duties, all parties, including the State, will be bound by that decision.

An analogy may sharpen the issue. Congress has enacted hundreds of federal criminal statutes. It has also provided for enforcement of those laws by various federal agencies. State police officers could be enjoined from interfering with the enforcement of these federal laws by federal agents. But a federal court could not assign the enforcement responsibilities themselves directly to State police officers who had not been empowered by the State legislature to perform those functions. Is that clear excess of federal authority in any way distinguishable from what the district judge has done here?

The respondents have cited several school desegregation cases in arguing against this fundamental principle. The commercial fishermen resent the obvious effort of the respondents, through forced and constant references to desegregation cases, to turn this into a civil rights case. It is no such thing. It is an effort by one group of commercial fishermen to exclude a larger number of competitors from access to a limited valuable resource. As such, the case must be viewed as a clash of economic interests in which several Indian treaties happen to be the focus.

In addition, in relying on the desegregation cases, respondents fail to note that the State statutes in question in those cases—statutes which purported to prohibit State officials from complying with desegregation orders—were themselves held to be unconstitutional. *See, e.g., Griffin* v. *County School Board of Prince Edward County, supra.* [62] This is a crucial distinction, for in this case there has been no holding that the State statutes regulating the Department of Fisheries' authority are in violation of federal law. Since those statutes were valid and in force, State officials are bound to obey them, and to act only within

---

[62] *See also Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959). In those two cases as well as *Griffin*, the courts found that the intent and purpose of the legislation in question was to prevent compliance with the Constitution.

their limits, any district court orders to the contrary notwithstanding.[63]

(b) Nor is this issue moot, as the Indians argue. Ind. Br. at 184, 221. First, the State and the Department of Fisheries remain subject to certain affirmative duties in connection with the district court's management of the fisheries. *See, e.g.*, Preliminary Injunction Order (Oct. 17, 1977), Pet. No. 78-119, at A97-A99; Preliminary Injunction Order re Enforcement (June 6, 1978), Pet. No. 78-139, at C3-C4. Indeed, in the June 6, 1978 Order, the district court decreed that "[n]othing in this order shall relieve the defendant State of Washington or its agencies, officers and employees of any obligation under prior orders of this Court . . . ." *Cf. Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963).

Moreover, the district judge assumed fisheries management responsibilities because the State could not enforce his allocation plan. *See* Memorandum Order and Preliminary Injunction (Aug. 31, 1977), Pet. No. 78-119 at A55. The judge clearly preferred State implementation of his plan. Thus, there is a real prospect that allocation duties will be reimposed on the Department of Fisheries in the future, since the district judge cannot assume permanent management of the fishery. Clearly, then, the issue of the Department of Fisheries' allocation power is sufficiently "alive" to be considered by this Court. *Cf. Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972).

---

[63] The Indians characterize *Bell* v. *School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Thaxton* v. *Vaughan*, 321 F.2d 474 (4th Cir. 1963); *Wright* v. *County School Board*, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd on other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); and *Bradley* v. *School Board*, 51 F.R.D. 139 (E.D. Va. 1970), as going merely to the respect a district court should give to a State's internal allocation of power among officials. The cases actually stand for the proposition that State or local officials cannot be required to exceed their authority under State law.

III. THE DISTRICT COURT'S INJUNCTIONS AGAINST THE NON-TREATY FISHERMEN WERE ISSUED WITHOUT PERSONAL JURISDICTION.

1. The Orders Against Petitioners Were Not Merely Ancillary To The Original Decree.

As non-parties to the original federal proceedings in this case, the petitioner associations and their members were not properly bound by the district judge's orders against them in 1977 and 1978. The government and the Indians mistakenly rely on exceptional cases that permit the federal courts to enjoin non-parties from actively interfering with judicial decrees. To apply those cases here, however, would be to allow the exception to swallow the rule. In this case the non-treaty fishermen were not enjoined from preventing the sole defendant—the State—from complying with the decree against it. Instead, the district judge retroactively treated the non-treaty fishermen as indispensable parties and summarily extended to them the principal form of relief sought by the plaintiffs, because relief against the State alone was deemed insufficient.

These extraordinary orders—many of which were issued *ex parte*—shifted directly to the non-treaty fishermen the full burden of the district judge's allocation scheme. The orders were not ancillary to the injunction issued against the State. Rather, they were a wholly new form of relief *in lieu* of the relief that had been directed against the State. The "ancillary order" doctrine is thus irrelevant as a pretext for what now has become the main equitable relief in favor of the plaintiff Indians.

As discussed in petitioners' main brief (at 55-73), both due process and Rule 65(d) prohibit the enforcement of injunctions against persons who have never had their day in court—either directly, as named parties, or indirectly, through an agent or other representative whose interests in the controversy are identical to those of the non-party. Under either of these tests, it is abundantly clear that the non-treaty fishermen cannot be

bound by injunctions whose legal and factual foundation and whose equitable propriety they have never had an opportunity to contest.

The conclusion that the district judge overstepped his constitutional and equitable power here is not weakened by a line of lower court decisions, relied on by the respondents, in which injunctive orders were directed against non-parties. In many of these cases the question of the enforceability of the injunctions arose in the context of contempt proceedings, rather than on direct appeal from the orders.[64] This Court has on many occasions indicated that the validity of an injunctive decree is not always fully open to challenge in subsequent proceedings for contempt. *See United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).

As developed in *Walker* and later cases, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530 (1971); *Maness* v. *Meyers*, 419 U.S. 449 (1975), the rule appears to be that a defendant in a criminal contempt proceeding will be restricted in his challenges to the underlying order if he failed to pursue an opportunity for effective review of that order before violating it.[65] *See* C. Wright, *Law of Federal Courts* § 16 at 59-62 (West 3d ed. 1976). Thus, in the cases relied on by respondents it is by no

---

[64] *E.g.*, *United States* v. *Hall*, 472 F.2d 261 (5th Cir. 1972); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Russell* v. *United States*, 86 F.2d 389 (8th Cir. 1936); *Minerich* v. *United States*, 29 F.2d 565 (6th Cir.), *cert. denied*, 279 U.S. 843 (1929); *In re Curtis Petition*, 240 F. Supp. 475 (E.D. Mo. 1965), *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967).

[65] However, as Mr. Justice Rehnquist noted in passing on a stay application submitted on behalf of two non-treaty fishermen convicted of criminal contempt for violating the orders in this case, *Dolman* v. *United States*, No. A-534 (78-987) (decided December 21, 1978), an exception to this rule has been recognized for cases in which the defect in the underlying order is a lack of *in personam* jurisdiction.

means clear that the injunctions against non-parties would have been enforceable if challenged directly, as in the instant appeals.

More generally, however, the decisions relied upon by the respondents do not really bolster their position because in each case the orders directed against non-parties were merely *ancillary* to the main equitable relief running against the named party-defendants. The orders directed the non-parties simply to "step aside" in order to facilitate the operation of the court's principal remedial scheme. In the present case, by contrast, the State of Washington and its various agencies—the original named party-defendants in the federal litigation—have been virtually irrelevant to the district judge's remedial scheme since the issuance in 1977 and 1978 of injunctions running directly against the non-treaty fishermen.

These injunctions are not ancillary to the main relief in the case; they *are* the main relief in the case. In this respect *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), cited by respondents, is inapposite. In *Swann* and other cases this Court has recognized that broad federal injunctive decrees may sometimes inpinge on the activities of persons who are technically strangers to the underlying litigation. However, it hardly follows that these strangers may be enjoined by the court as the principal means of implementing the court's decree. There is simply no warrant for excusing the failure of the government, the Indians, and the district judge to recognize that the non-treaty fishermen should have been brought into the federal case at the pre-trial stage if the relief to be awarded might include orders directly commanding them not to fish.

2. The Non-Treaty Fishermen Were Not Vicarious Parties To The Original Federal Proceedings and Suffered Actual Prejudice From the Denial of a Hearing.

(a) Like the court of appeals, the government and the Indians also rely heavily on various *parens patriae* decisions by

this Court that have permitted individual States to sue in their sovereign capacity and as representatives of their citizens.[66] For reasons explained in our main brief (at 66-67) and in our showing above (at 54-58, *supra*) that the doctrine of *res judicata* is not applicable as a bar to hearing the grievances of the non-treaty fishermen, those cases are wide of the mark here.

These cases clearly recognize that the preclusive effect of litigation—even litigation between sovereign States—depends on the adequacy of the representation of non-parties who are later sought to be bound. Where there has been no effort by the trial court or by the State to appoint special counsel to advance the interests of diverse groups *within* a State, *compare City of Tacoma* v. *Taxpayers of Tacoma, supra*, and where the State was obliged to tailor its presentation to promote "the economic well-being of the citizens as a whole," *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P.2d 1151, 1153 (1977), the State cannot be deemed the legally adequate representative of any group of non-parties with independent interests.

The legal inadequacy of the State's representation of the interests of the non-treaty fishermen in this case is not merely a matter of theory or speculation. It was not until the second appeal to the court of appeals that the State of Washington was placed on notice that as named defendant in the litigation its role was in effect that of class representative on behalf of a defendant class consisting of all the non-Indian commercial fishermen.

Thus, it is not surprising that in the original proceedings in the district court, and in clear conflict with the interests of the non-treaty fishermen—as indeed the government and the

[66] *See, e.g., City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Missouri* v. *Illinois*, 180 U.S. 208 (1901)

Indians emphasize in this Court—one of the State agencies felt itself free to support an apportionment of the fishery resource. The agency urged the court to "quantify the treaty right by reference to an objective definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to the waters of the State of Washington in the case area." *See* U.S. Br. at 8-9. That position is flatly at odds with our contention that the treaties provide no justification for guaranteeing any fishermen a particular level of commercial success.

Subsequently, in the first appeal to the court of appeals, the State also acquiesced in some aspects of the district judge's apportionment formula, *see* 520 F.2d at 690, and in the second appeal the State accepted without serious challenge the overall 45-55 allocation, *see* 573 F.2d at 1130. Indeed, the court of appeals in the second appeal all but conceded the inadequacy of the state's representation of petitioners' interests, observing bluntly that "[a]ny complaints the fishers may have . . . are matters between them and the State." 573 F.2d at 1133.

One need not look far to find still other evidence of specific prejudice resulting from peremptory imposition of the district court's 1977 and 1978 injunctive orders directed against petitioners. As sustained by the court of appeals, the entire apportionment program at issue in this case rests on the district court's exercise of equitable discretion. Yet one searches the record in vain for meaningful evidence concerning the economic impact of the 50-50 allocation on the non-treaty commercial fishermen—the very persons who are most directly affected by the remedial scheme and whose livelihoods are most directly threatened.

By the time the district judge extended his orders to these fishermen, he insisted that "[t]he rights of the treaty and non-treaty fishermen [had] already been adjudicated," so that, in the view of the district court, the "economic disruption associated with implementing the 1974 decree [was] not legally

cognizable." JA 483 (¶ 4). *See also* JA 538-41. The commercial fishing industry would have been the best source of information about the value of the fisheries and about the economic impact of various schemes of allocation. Obviously, the record before this Court would look very different if the government had brought the non-treaty fishermen into the federal litigation at the outset. Since this was never done, the district court's equitable discretion was exercised in a vacuum, to the manifest prejudice of the interests of the non-treaty fishermen.[67]

Furthermore, to combat the Indians' claims to special or even exclusive fishing rights, the commercial fishing industry could have shown through its records that long prior to the signing of the treaties there were non-Indian fishermen participating in the harvest of salmon alongside Indian fishermen, with no evidence of a claim of superiority or exclusivity by the Indians. In addition, the non-treaty fishermen could have submitted detailed evidence on a tribe-by-tribe basis and a location-by-location basis demonstrating a lack of discrimination against Indian fishermen. This presentation would have nullified any pretext for the district judge's apportionment of the entire fishery.

---

[67] Because the proceedings in connection with the 1977 and 1978 orders only addressed the enforcement and not the merits of the court's initial decision in 1974, the non-treaty fishermen had no meaningful opportunity to participate in the federal litigation. In addition, the district court expressly acknowledged that "[t]he fact that [the non-treaty fishermen] are not parties to this lawsuit has placed restrictions on the scope of their participation" and that "[u]nder the reference to the Magistrate, there was no power for him to grant the status of 'party' to a non-party." JA 480 (¶¶ 11-12).

Thus, even if the court had acquired personal jurisdiction over the non-treaty fishermen in connection with the 1977 and 1978 orders, those proceedings were clearly inadequate to satisfy petitioners' due process rights to address the merits of the district court's 1974 decision.

(b) Still another argument advanced by respondents is that the district court's injunctions against petitioners are enforceable as *in rem* decrees. This notion, which first appeared seven years after the federal complaint was filed, deserves high marks for creativity but a failing grade on the merits. From its inception, the federal litigation has been predicated on *in personam* jurisdiction over the State and its agencies, not on *in rem* jurisdiction based on any alleged power over fish swimming freely in the waters of Puget Sound.

Nor could *in rem* jurisdiction have been perfected in this case. The principal case on which the district judge relied in first accepting that theory in 1977, *United States* v. *Dean Rubber Manufacturing. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946),[68] is the case Professor Wright singles out for critical discussion in concluding that the "application of in rem jurisdiction principles to injunction decrees seem dubious." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2956 at 573 (West 1973).

Apart from the general impropriety of using *in rem* jurisdiction as a justification for an injunction "purporting to bind the world," *id.* at 553, the concept is singularly inapplicable here. The essential predicate for the assertion of *in rem* or *quasi in rem* jurisdiction is the "attachment or seizure of property present in the jurisdiction . . . ." *Shaffer* v. *Heitner*, 433 U.S. 186, 196 (1977); *see* 4 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1070, 1072 (West 1969). In this case, of course, there has been no seizure or attachment of the free-swimming fish, and, thus, there is no "property" under the control of the district court. Indeed, the respondents' recent contrivance, predictably accepted by the district judge, runs

---

[68] In extending the September 27, 1977, injunction to the non-treaty fishermen, the district judge held that he had power to "enjoin interference with property which is under the control of this Court." Pet. No. 78-119 at A-87. An identical conclusion underlies the extant injunction of June 6, 1978. Pet. No. 78-139 at C-13.

squarely afoul of the earlier explicit acknowledgement by the court of appeals on the first appeal:

> "The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession." 520 F.2d at 687.

As thus recognized by the court of appeals, this Court has repeatedly rejected any fictional notion that fish or game are anyone's property, including a State's, "until they are reduced to possession by skillful capture." *Douglas* v. *Sea Coast Products,* 431 U.S. 265, 284 (1977); *see Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Missouri* v. *Holland,* 252 U.S. 416 (1920). Hence, it is pure nonsense to contend that there is *in rem* jurisdiction over free swimming fish that empowers a court to restrict the right of non-parties to try to catch those fish.[69]

(c) Finally, the injunctions against the non-treaty fishermen exceeded the district court's powers because there was not even a colorable attempt to comply with the strict requirements of Federal Rule 65(d). The non-treaty fishermen are obviously not "officers, agents, servants, employees [or] attorneys" of the State of Washington. Nor were petitioners in "active concert or participation" with the State as those terms are used in the Rule.

---

[69] Even if the injunctions against the non-treaty fishermen could be properly characterized as *in rem*, that approach does not provide an alternative basis for binding non-parties. This Court held in *Shaffer* v. *Heitner, supra,* that *in rem* or *quasi in rem* jurisdiction is subject to the same due process limitations as assertions of *in personam* jurisdiction. Thus, the enforceability of the district court's 1977 and 1978 orders depends, ultimately, on whether the court properly obtained personal jurisdiction over petitioners at the outset of the federal litigation. This, of course, was never done. Nor did the district court have constructive personal jurisdiction over petitioners since, as we have shown, they were neither privies of the State nor adequately represented by the State.

That aspect of the Rule is meant to bar a named party from doing indirectly—through "aiders and abettors," *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9, 14 (1945)—what he has been lawfully enjoined from doing directly. The "active concert or participation" language of Rule 65(d) was derived from the seminal decision in *Alemite Manufacturing Corp.* v. *Staff,* 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand, J.), and is manifestly *not* intended to authorize injunctions against non-parties who, like the non-treaty fishermen, "act independently and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk,* 291 U.S. 431, 437 (1934). An injunction directed at non-parties who are neither agents nor confederates of a named party-defendant "violates established principles of equity jurisdiction and procedure." *Id.*

The equitable powers of a federal judge are considerable, but they are not without limit. A judge's decrees are not like criminal statutes, binding on all persons who engage in the proscribed conduct. Yet it is not an overstatement to say that the district judge in this case purported to act in precisely that way.

CONCLUSION

The judgments of the United States Court of Appeals and the enforcement order of the United States District Court should be reversed. The judgments of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz,
Wells & Fryer
Attorneys for Puget Sound
Gillnetters Association, et al.

JOSEPH T. MIJICH
JOHN P. WORLD
Attorneys for Purse Seine
Vessel Owners Association, et al.

Of counsel:

PHILLIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed

February 1979